Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

UNITED STATES AND CALIFORNIA *EX REL.* O'CONNELL AND MOYERS,

Petitioners,

v.

CHAPMAN UNIVERSITY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioners' notice of appeal was timely under controlling circuit precedent, but that precedent was later abrogated. The Ninth Circuit then reluctantly concluded that it was required to dismiss Petitioners' appeal due to this Court's bitterly contested 5-4 decision in *Bowles v. Russell*, 551 U.S. 205, 209-15 (2007), which held that noncompliance with the time limit in 28 U.S.C. § 2107 is a jurisdictional bar that cannot be equitably excused by a circuit court.

But in *Bowles*, neither the parties nor this Court considered whether a circuit court that lacks "power to proceed with the appeal" on the merits may at least "exercise ... its supervisory appellate power ... [to] dispos[e] of the case as justice requires" in a way that prospectively cures the noncompliance with § 2107. *Walling v. James V. Reuter, Inc.*, 321 U.S. 671, 676 (1944). *Bowles* thus overlooked this Court's longstanding equitable practice of "vacat[ing] ... and remand[ing] ... [for] ent[ry] [of] a fresh decree from which ... a timely appeal" may be "perfect[ed]"—a practice it uses where § 2107's time for appealing to the circuit court has elapsed because the appellant reasonably took a jurisdictionally improper direct appeal to this Court instead. *See, e.g., Phillips v. United States*, 312 U.S. 246, 254 (1941). That traditional practice has been uniformly applied by this Court for at least 60 years, in 50 cases, by 30 Justices, including a majority of the current Court.

The question presented is whether the Courts of Appeals, when justly disposing of an appeal that is jurisdictionally untimely due to a judicial error, may vacate and remand for entry of a fresh judgment from which a timely appeal may be taken.

PARTIES TO THE PROCEEDING

Petitioners in this case are Dr. Katherine R. O'Connell and Dr. Chris Moyers, who were Plaintiffs-Appellants below.

Respondent is Chapman University, which was the Defendant-Appellee below.

Daniel Robert Bartley, who was Petitioners' counsel below, was also an Appellant below in part.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Dr. Katherine R. O'Connell and Dr. Chris Moyers, respectfully submit this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's order dismissing Petitioners' appeal is unreported. Pet.App. 1a.[1] The order of the United States District Court for the Central District of California granting Respondent's motion for summary judgment is also unreported. *Id.* 4a.

JURISDICTION

The Ninth Circuit filed its order on August 17, 2010. On November 10, 2010, Justice Kennedy extended the time within which to file a petition for a writ of certiorari until December 17, 2010. No. 10A472. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2106 and 28 U.S.C. § 2107, as well as predecessor versions of those statutes, are set forth in full in the appendix.

STATEMENT OF THE CASE

1. On April 3, 2006, Petitioners filed a complaint in federal district court that alleged claims against Respondent under, *inter alia*, the Federal False Claims Act, 31 U.S.C. § 3729 *et seq.*, and the California False Claims Act, Cal. Gov. Code § 12650

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[1] Herein: (1) "Pet.App." refers to the appendix of this petition; (2) "CA9 Docket" refers to the Clerk's Docket in No. 07-56864 (9th Cir.); and (3) "E.R." refers to the Excerpts of Record filed in No. 07-56864 (9th Cir.), *see* CA9 Docket # 38.

et seq. *See* Pet.App. 9a-10a. The United States and California both declined to intervene as formal parties. As a result, Petitioners litigated the action as *qui tam* relators on behalf of those governments. *Id.* 5a.

On October 23, 2007, the district court filed an order granting summary judgment to Respondent. *Id.* 4a. And the next day, October 24, 2007, the court entered judgment for Respondent. *Id.* 3a.

2. On December 21, 2007, which was 58 days after the district court entered judgment, Petitioners filed their notice of appeal. *Id.* Under 28 U.S.C. § 2107 and Fed. R. App. P. 4(a)(1), although a notice of appeal ordinarily must be filed within 30 days of judgment, a 60-day period applies when "the United States ... is a party." And, under controlling Ninth Circuit precedent at the time of the judgment here, the 60-day period had been held applicable to all federal *qui tam* cases because of the United States' interest and involvement, even if the government had declined to intervene as a formal party. *See United States ex rel. Haycock v. Hughes Aircraft Co.*, 98 F.3d 1100, 1102 (9th Cir. 1996). Petitioners expressly cited *Haycock* in their notice of appeal. E.R. 2.[2]

The parties proceeded to brief the merits on a schedule ordered by the Ninth Circuit. By May 27,

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[2] Petitioners' notice of appeal also included an appeal by their counsel related to a discovery sanctions order. Pet.App. 3a; E.R. 1. In addition, Respondent later filed a notice of appeal from a post-judgment order that denied its motion for attorneys' fees. Pet.App. 2a-3a. Both of those separate appeals have been finally resolved in the Ninth Circuit, *see id.* 3a; CA9 Docket # 64, and neither of them is before this Court.

2009, Petitioners and Respondent had each filed their principal merits briefs and the case was nearly ready to be submitted to the court for argument or decision. *See* CA9 Docket # 24, 31, 42.

However, on June 8, 2009, this Court issued its decision in *United States ex rel. Eisenstein v. City of New York*, 129 S. Ct. 2230 (2009), holding that the 60-day period for appeal is unavailable in *qui tam* cases where the United States is not a formal "party" due to its non-intervention. *Id.* at 2233-37. In concluding that the 30-day period applies in such cases, this Court expressly abrogated the Ninth Circuit's *Haycock* decision, as well as identical decisions in the Third, Fifth, and Seventh Circuits. *See id.* at 2233 n.1. Although this Court was aware that its ruling created "the possibility of harsh consequences" for "those who relied on the holdings of courts adopting the 60-day limit," it explained that it would be improper to allow that backward-looking "possibility" to bias its forward-looking conclusion concerning the proper legal interpretation of § 2107 and Rule 4(a)(1). *See id.* at 2236 n.4.

Shortly thereafter, Respondent moved to dismiss Petitioners' appeal as untimely filed. CA9 Docket # 52. The Ninth Circuit stayed the appeal pending resolution of a separate case in which a different panel was already considering the implications of *Eisenstein* for *qui tam* appeals that, in reasonable reliance on *Haycock*, had been filed during the 30-to-60-day window. Pet.App. 2a.

3. In the related case, the Ninth Circuit ultimately concluded that, while it "sympathized with [appellants] who complied with [its] precedent in filing ... notice[s] of appeal," it could provide no

relief to such litigants. *See United States ex rel. Haight v. Catholic Healthcare West*, 602 F.3d 949, 957 (9th Cir. 2010), *cert. denied* 131 S. Ct. 366 (2010). The court explained that, under this Court's decision in *Bowles v. Russell*, 551 U.S. 205 (2007), the untimely filed notice of appeal "deprive[d] [it] of jurisdiction." *Haight*, 602 F.3d at 953. And the court further reasoned that *Bowles* "ha[d] instructed ... that concerns of equity must give way before the 'rigorous rules' of statutory jurisdiction," as purportedly illustrated by the decision in *Bowles* to overrule as "illegitimate" two earlier cases that had allowed appellate courts to excuse noncompliance with the appellate time limits in "unique circumstances." *Id.* at 953, 956. The *Haight* panel emphasized, however, that it was "a serious understatement to call [its] result 'inequitable,'" given that the appellants there—like Petitioners here—had "reasonably relied on Ninth Circuit precedent that gave them 60 days to file a notice of appeal." *Id.* at 953.

4. Following *Haight*, the Ninth Circuit in this case summarily held that "dismissal of [Petitioners'] appeal[]"was "require[d]." Pet.App. 2a. In so holding, the court stated that a "remand" to the district court "would be futile." *Id.* 3a.

REASONS FOR GRANTING THE PETITION

As Justice Ginsburg and others have noted, *Bowles v. Russell*, 551 U.S. 205 (2007), "moved in a different direction" from this Court's recent decisions limiting the types of rules that are subject to the stringent requirements of "jurisdictional" rules. *See Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1250 (2010) (opinion concurring in part and

concurring in the judgment). This case presents this Court with an opportunity to mitigate the indisputably inequitable results created by *Bowles*, while still faithfully adhering to *Bowles*' holding that noncompliance with the time for filing a civil appeal is a jurisdictional bar that cannot be equitably excused. *Bowles* declined to redress justifiable noncompliance with 28 U.S.C. § 2107—and overruled the "unique circumstances" doctrine—because the appellant there had failed to provide this Court with a legitimate method for taking equitable considerations into account under a rule that had long been treated as jurisdictional. *See Bowles*, 551 U.S. at 209-10, 213-15. Yet a principled and well-established equitable vehicle does exist in the particular context of § 2107.

Specifically, although an appellate court that lacks jurisdiction never has the power to retain the case for an adjudication on the merits, it always possesses the equitable power to dispose of the appeal in a just manner, which includes disposing of it in a way that prospectively cures the jurisdictional defect. Accordingly, this Court has a longstanding equitable tradition, in cases involving improper direct appeals under ambiguous jurisdictional statutes, of vacating and remanding for entry of a fresh judgment so that a timely appeal can be taken to the proper circuit court. *See, e.g., Walling v. James V. Reuter, Inc.*, 321 U.S. 671, 676-77 (1944); *Phillips v. United States*, 312 U.S. 246, 254 (1941). This equitable vacatur tradition has been consistently and unquestioningly applied by this Court for at least 60 years, in 50 different decisions, by 30 different Justices—including, most recently, in a 1995 decision joined by Justices Scalia, Kennedy,

Thomas, Ginsburg, and Breyer. *See Franklin v. Lawrimore*, 516 U.S. 801 (1995); *Castro Cnty. v. Crespin*, 101 F.3d 121, 124-25 (D.C. Cir. 1996).

The equitable vacatur practice reflects "a long line of this Court's decisions left undisturbed by Congress," which is the very type of tradition that this Court has observed is the essential basis of *Bowles*' jurisdictional holding. *See Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs & Trainmen*, 130 S. Ct. 584, 597 (2009). Consequently, just as tradition was the reason in *Bowles* for treating the civil appeal time limit as jurisdictional, so too tradition is the reason why appellate courts possess the equitable power to vacate and remand for a fresh judgment when the untimeliness of the appeal was caused by a judicial error. To retain the traditional jurisdictional characterization of appellate time limits while abandoning a traditional equitable remedy for jurisdictionally untimely appeals would transform into a full-blown conflict the "undeniable tension" that Justice Ginsburg has identified between *Bowles* and this Court's remaining jurisdictional jurisprudence. *See Reed Elsevier*, 130 S. Ct. at 1250-51 (opinion concurring in part and concurring in the judgment). Indeed, such a "bait and switch" would indisputably be an "intolerable" way for "the judicial system to treat people." *Bowles*, 551 U.S. at 215 (Souter, J., dissenting).

In recent Terms, this Court has made a concerted effort to scrutinize lower court holdings characterizing rules as jurisdictional, in part because of the propensity of such rules to deny litigants their full day in court, no matter how justifiable their noncompliance or how inequitable the result.

Bowles' seeming elimination of the role of equity under § 2107 was contrary to that trend, and so it is all the more troubling that its unjust result flowed directly from the failure of the parties to inform this Court of the full scope of an appellate court's powers to dispose of a case. Accordingly, this Court should grant certiorari to review, and then correct, the Ninth Circuit's erroneous conclusion that dismissal of Petitioners' appeal is required by *Bowles* and that remand would be futile.

I. APPELLATE COURTS POSSESS THE EQUITABLE POWER TO DISPOSE OF A JURISDICTIONALLY UNTIMELY APPEAL BY VACATING AND REMANDING FOR ENTRY OF A FRESH JUDGMENT FROM WHICH A TIMELY APPEAL CAN BE NOTICED

Bowles' jurisdictional holding was based on settled tradition. Yet this Court has an even more settled tradition, in certain cases where it lacks appellate jurisdiction, of prospectively curing jurisdictionally untimely appeals by vacating and remanding for entry of a fresh judgment that restarts the appellate clock. And the Courts of Appeals likewise have the power to provide such equitable relief when they lack jurisdiction over an untimely appeal.

A. *Bowles* Relied On Tradition In Holding That An Untimely Civil Appeal Is A Jurisdictional Bar That Appellate Courts Cannot Equitably Excuse

1. *Bowles* presented the question "whether [a] Court of Appeals ha[s] jurisdiction to entertain an appeal filed after the statutory period" established in § 2107, where the untimeliness was caused by the

fact that "a District Court purported to extend a party's time for filing [its] appeal beyond the period allowed by statute." 551 U.S. at 206. In particular, the district court, when granting Bowles' motion to reopen the time for appealing from the denial of his habeas petition, had given Bowles three more days than was permitted under § 2107(c), and the question presented was whether the Sixth Circuit had correctly decided that it therefore lacked jurisdiction to hear the merits of Bowles' appeal. *See id.* at 207.

A five-Justice majority of this Court held that Bowles' "untimely notice—even though filed in reliance upon [the] District Court's order—deprived the Court of Appeals of jurisdiction." *Id.* at 206-07. The majority reasoned that this Court "ha[d] long and repeatedly held that the time limits for filing a notice of appeal are jurisdictional in nature." *Id.* at 206. In order to demonstrate this Court's "longstanding treatment of statutory time limits for taking an appeal as jurisdictional," the majority provided a string-cite of seven cases—five from after 1960 and two from the nineteenth century. *Id.* at 209-10 & n.2. Although two other decisions from the early 1960's had nevertheless permitted appellate courts to adjudicate the merits in the "unique circumstances" where an untimely appeal was caused by a district court's error, the majority elected to overrule those cases, reasoning that "this Court has no authority to create equitable exceptions to jurisdictional requirements." *Id.* at 213-14 (overruling *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962) (*per curiam*), and *Thompson v. INS*, 375 U.S. 384 (1964) (*per curiam*)). Finally, responding to the concern that the result of

its decision was "inequitable," the majority observed that "Congress may authorize courts to promulgate rules that excuse compliance with the statutory time limits." *Id.* at 214.

Four Justices in *Bowles* dissented, objecting that it was "intolerable for the judicial system to treat people this way[] and [that] there [was] not even a technical justification for condoning this bait and switch." *Id.* at 215 (Souter, J., dissenting). The dissenters argued that, in a recent line of decisions, this Court "ha[d] tried to clean up [the] language" in its older cases, which had been "less than meticulous" when characterizing rules as "jurisdictional." *See id.* at 215-17. And the dissenters explained that, as part of that jurisprudential project, this Court had announced that: (1) "the label 'jurisdictional'" should be used "only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority," "not for claim-processing rules" such as the filing deadline in § 2107; and (2) "courts should treat" "a statutory limitation" "as non-jurisdictional in character" when—as is the case with § 2107—"Congress does not rank [it] as jurisdictional." *See id.* at 217, 218 (quoting *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004), and *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 516 (2006)).

2. Petitioners here do not question *Bowles*' holding that noncompliance with § 2107 is a jurisdictional bar that appellate courts cannot equitably excuse. Instead, Petitioners emphasize two critical aspects of that holding.

First, the jurisdictional holding in *Bowles* heavily relied on this Court's traditional practice. *Bowles* repeatedly invoked the historical pedigree of the rule that it adopted. *See id.* at 206, 209-10. This was most apparent in the majority's rejoinder to the dissent's reliance on the reasoning of the *Kontrick-Arbaugh* line: "[g]iven the choice between calling into question some dicta in our recent opinions and effectively overruling a century's worth of practice, we think the former option is the only prudent course." *Id.* at 209 n.2. Likewise, in two unanimous decisions last Term, this Court reaffirmed that the jurisdictional holding in *Bowles* rests on this Court's "historical treatment of the type of limitation § 2107 imposes," *Reed Elsevier*, 130 S. Ct. at 1247-48, as reflected in "a long line of this Court's decisions left undisturbed by Congress," *id.* at 1250-51 (Ginsburg, J., concurring in part and concurring in the judgment); *Union Pac. R.R. Co.*, 130 S. Ct. at 597.

Second, *Bowles* trained on whether the Sixth Circuit could have retained the untimely appeal for adjudication of the merits, not on whether the Sixth Circuit could have disposed of that appeal in a manner that enabled a future timely appeal. While holding that appellate courts cannot resolve the merits of an untimely civil appeal because they lack the power to create equitable excuses for noncompliance with § 2107's jurisdictional time limit, *Bowles* did not consider whether such courts at least may equitably dispose of the putative appeal by entering a non-merits vacatur that prospectively cures the untimeliness. *See* 551 U.S. at 213-15. This Court did not reach that question for the simple reason that the parties failed to raise it. Yet had they done so, this Court would have discovered its

own well-established tradition of providing precisely such an equitable remedy.

B. In Jurisdictionally Improper Direct Appeals, This Court Has A Long And Unbroken Equitable Tradition Of Vacating And Remanding For Entry Of A Fresh Judgment From Which A Timely Appeal Can Be Taken To The Proper Circuit Court

1. Like all federal courts, this Court "always has jurisdiction to determine its own jurisdiction." *United States v. Ruiz*, 536 U.S. 622, 628 (2002) (citing *United States v. United Mine Workers*, 330 U.S. 258, 291 (1947)). And when the exercise of that threshold jurisdiction reveals "for any reason [that] the Court may not properly proceed with a case brought to it on appeal, or [that] it is without power to proceed with the appeal," "[i]t is a familiar practice of this Court that ... it may nevertheless, in the exercise of its supervisory appellate power, make such disposition of the case as justice requires." *Walling*, 321 U.S. at 676. As Justice Scalia has explained, such "matters of judicial administration and practice" are "reasonably ancillary to the [federal courts'] primary, dispute-deciding function." *See U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 21-22 (1994) (citing *Walling* and discussing the so-called *Munsingwear* practice of equitable vacatur when intervening mootness bars appellate review).

One of the "familiar practices" cited by *Walling* as an exemplar of this Court's "supervisory appellate power" to justly dispose of jurisdictionally barred appeals is this Court's equitable treatment of cases where the time for filing an appeal in the circuit

court has elapsed because the appellant has erroneously, albeit reasonably, taken a direct appeal to this Court instead. Specifically, "[w]hen [this Court] is without jurisdiction to decide an appeal which should have been prosecuted to another court" under an ambiguous jurisdictional statute—such that the jurisdictional time limit for appealing to the proper circuit court has since passed—this Court nevertheless "vacate[s] the judgment and remand[s] the cause in order to enable the court below to enter a new judgment from which a proper appeal may be taken" within the renewed jurisdictional time period. *See Walling*, 321 U.S. at 677.

As demonstrated below, Petitioners have identified at least 50 different cases from this Court, decided between 1934 and 1995, that implement this equitable practice of vacating the judgment below, notwithstanding the absence of appellate jurisdiction, solely in order to restart the clock for filing a jurisdictionally timely civil appeal. Indeed, almost all of the 36 Justices who were members of this Court during those 61 years have joined at least one opinion applying the practice—including a majority of the current Justices—and not a single Justice has ever questioned its legitimacy.

2. The practice of vacating and remanding to enable the filing of a jurisdictionally timely appeal was born in *Gully v. Interstate Natural Gas Co.*, 292 U.S. 16 (1934) (*per curiam*). There, the plaintiff challenged a state tax assessment on federal constitutional grounds. *Id.* at 17. Under federal law at the time, certain federal challenges to state action could only be considered by a three-judge district court, and certain orders by such three-judge courts

were directly appealable to this Court. *See id.* at 17-18. In *Gully*, a three-judge district court was convened and entered a permanent injunction against the challenged assessment, at which point the state defendants took a direct appeal to this Court. *Id.* This Court held, however, that the plaintiff's challenge fell outside of the federal law that required the convocation of a three-judge court and that authorized a direct appeal. *Id.* at 18. Consequently, this Court lacked jurisdiction over the appeal. *Id.*

But this Court was acutely aware of the potential inequity created by its jurisdictional holding. Specifically, while the state officials could have "appeal[ed] [the injunction] to the Circuit Court of Appeals, notwithstanding the participation of three judges," such "relief [could no longer] be afforded ... as the time for appeal to that court ha[d] expired," and thus such an appeal had become jurisdictionally barred as well. *Id.* at 19; *see also* 28 U.S.C. § 230 (1934 ed. Supp. I). This Court determined that, "[i]n these circumstances"—where simply dismissing the improper appeal would create the inequitable result that a district court's judgment goes unreviewed due merely to jurisdictional confusion—"the appropriate action is to reverse the decree below," "without passing upon the merits," "and to remand the cause to the District Court for further proceedings" in which it reissues its order, thereby restarting the time period within which an appeal can be taken to the circuit court. *Gully*, 292 U.S. at 19.

A month later, this Court reaffirmed and clarified this equitable vacatur practice in *Oklahoma Gas & Electric Co. v. Oklahoma Packing Co.*, 292

U.S. 386 (1934). As in *Gully*, this Court first concluded that "[t]he three-judge procedure" had not been required below. *Id.* at 390-92. It emphasized that "[t]he issue [was] not one of the federal jurisdiction of the district court, ... but whether a final hearing by three judges was prescribed ... and hence whether this Court has jurisdiction to hear the appeal." *Id.* at 391. Having decided it was "without jurisdiction to hear the merits of the appeal," this Court explained that its threshold "exercise of its appellate jurisdiction" to determine jurisdiction included the "authority to ... frame [its] order in a way that will save to the appellants their proper remedies." *Id.* at 392. Appellants, "[b]y mistakenly appealing directly to this Court, ... ha[d] lost their opportunity to have the decree below reviewed on its merits, as the time for appeal to the Circuit Court of Appeals ha[d] expired." *Id.* Though this Court might have allowed that result "had the correct procedure ... been more definitively settled at the time the appeal ... was attempted," it held that, "in the[se] circumstances," "it is appropriate that the decree below should be vacated and the cause remanded to the district court for further proceedings." *Id.*

The equitable vacatur practice was soon so well settled that even Justice Frankfurter—a notorious stickler about the limits on the jurisdiction of federal courts[3]—unhesitatingly applied it when, once again, the unnecessary convocation of a three-judge court

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[3] *See, e.g.*, *Textile Workers Union v. Lincoln Mills of Ala.*, 353 U.S. 448, 460 (1957) (Frankfurter, J., dissenting); *Nat'l Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting); *Coleman v. Miller*, 307 U.S. 433, 460 (1939) (Frankfurter, J., dissenting).

below was held to be "a fatal bar to ... entertaining [an] appeal." *See Phillips*, 312 U.S. at 248, 253. As Justice Frankfurter canonically explained:

> Had a timely appeal been taken to the circuit court of appeals[,] the decree below could have been reviewed there, though rendered by three judges.... While this Court cannot hear the merits, it will, where the question of jurisdiction was not obviously settled by prior decisions, [enter] an order framed to save appellants their proper remedies.... We therefore vacate the decree and remand the cause to the court which heard the case so that it may enter a fresh decree from which appellants may, if they wish, perfect a timely appeal to the circuit court of appeals.

Id. at 254.

3. As described above, this Court's practice of equitable vacatur to enable a timely circuit court appeal initially arose in cases where the non-obvious defect in this Court's appellate jurisdiction was that a three-judge court had not been required below.[4]

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[4] *See also Butler v. Dexter*, 425 U.S. 262, 267 (1976) (*per curiam*); *Dickson v. Ford*, 419 U.S. 1085 (1974); *Gonzalez v. Automatic Emps. Credit Union*, 419 U.S. 90, 99-101 (1974); *Bd. of Regents of Univ. of Texas Sys. v. New Left Educ. Project*, 404 U.S. 541, 545 (1972); *Moody v. Flowers*, 387 U.S. 97, 104 (1967); *Pa. Pub. Util. Comm'n v. Pa. R.R. Co.*, 382 U.S. 281, 282 (1965) (*per curiam*); *Rorick v. Bd. of Commr's of Everglades Drainage Dist.*, 307 U.S. 208, 212-13 (1939); *William Jameson & Co. v. Morgenthau*, 307 U.S. 171, 173-74 (1939) (*per curiam*); *Int'l Ladies' Garment Workers Union v. Donnelly Garment Co.*, 304 U.S. 243, 251-52 (1938) (*per curiam*); *Wall v. McNee*, 296 U.S. 547, 548 (1935) (*per curiam*).

But the practice was and is by no means limited to that context. To the contrary, it has been equally applied in a variety of situations where the unsettled defect in this Court's appellate jurisdiction that had the effect of preventing a timely circuit court appeal was not tied to any mistake in the district court.

For example, this Court has employed the equitable vacatur practice to facilitate a timely circuit court appeal where its own appellate jurisdiction was lacking because: (1) a three-judge court was properly convened but the specific order at issue was not directly appealable to this Court;[5] (2) a district court declined to enter its order as a three-judge court;[6] (3) the decision of a single-judge district court narrowly interpreted a federal law in light of constitutional concerns and thus fell outside a provision conferring direct appellate jurisdiction in this Court for decisions actually holding federal statutes to be unconstitutional;[7] or (4) Congress had impliedly repealed a provision conferring direct appellate jurisdiction in this Court for certain cases from the District of Columbia.[8] There are also a

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[5] *See Castro Cnty. v. Crespin*, 101 F.3d 121, 124-25 (D.C. Cir. 1996) (discussing *Franklin v. Lawrimore*, 516 U.S. 801 (1995), and *Clinton v. Jeffers*, 503 U.S. 930 (1992)); *see also MTM, Inc. v. Baxley*, 420 U.S. 799, 802-04 (1975) (*per curiam*); *Mitchell v. Donovan*, 398 U.S. 427, 429-32 (1970) (*per curiam*); *Rockefeller v. Catholic Med. Ctr. of Brooklyn & Queens, Inc.*, 397 U.S. 820 (1970) (*per curiam*).

[6] *See Perez v. Ledesma*, 401 U.S. 82, 86-88 (1971); *Mengelkoch v. Indus. Welfare Comm'n*, 393 U.S. 83 (1968) (*per curiam*); *Wilson v. City of Port Lavaca*, 391 U.S. 352 (1968) (*per curiam*).

[7] *See United States v. Christian Echoes Nat'l Ministry*, 404 U.S. 561, 563-66 (1972) (*per curiam*).

[8] *See United States v. Belt*, 319 U.S. 521 (1943).

number of equitable vacatur cases where this Court's summary disposition does not itself explain the basis for the lack of appellate jurisdiction.[9]

This Court's equitable vacatur practice has not been employed as frequently in recent years as it was in the past, because, during the 1970's and 1980's, Congress repealed most of the statutes conferring direct appellate jurisdiction in this Court, thus eliminating much of the uncertainty about when appellate jurisdiction exists here. *See* Eugene Gressman et al., *Supreme Court Practice* § 2.7 (9th ed. 2007). But the equitable vacatur practice has not itself fallen into desuetude. For example, in 1995, the practice was applied by a unanimous Court that

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[9] *See Ayers v. Winter*, 467 U.S. 1211 (1984); *Burlington Northern, Inc. v. Sterling Colorado Beef Co.*, 429 U.S. 1084 (1977); *Stivers v. Minnesota*, 429 U.S. 1084 (1977); *Winters v. Lavine*, 429 U.S. 1012 (1976); *Gustafson v. Hoffman*, 429 U.S. 806 (1976); *Shouse v. Pierce Cnty.*, 425 U.S. 929 (1976); *Nat'l Socialist White People's Party v. Walsh*, 425 U.S. 929 (1976); *Rogers v. Inmates' Councilmatic Voice*, 422 U.S. 1031 (1975); *Democratic Exec. Comm. of Columbiana Cnty. v. Brown*, 422 U.S. 1002 (1975); *Smart v. Texas Power & Light Co.*, 421 U.S. 958 (1975); *Custom Recording Co. v. Blanton*, 421 U.S. 943 (1975); *BT Inv. Managers Inc. v. Dickinson*, 421 U.S. 901, 902 (1975); *Mendez v. Heller*, 420 U.S. 916 (1975); *Fitzgerald v. Digrazia*, 419 U.S. 1065 (1974); *Driskell v. Edwards*, 419 U.S. 812 (1974); *Daniel v. Waters*, 417 U.S. 963 (1974); *Webster v. Perry*, 417 U.S. 963 (1974); *Edelman v. Townsend*, 412 U.S. 914, 915 (1973); *Smith v. Garza*, 401 U.S. 1006 (1971); *Bd. of Pub. Instruction v. Banks*, 401 U.S. 988 (1971); *Hutcherson v. Lehtin*, 400 U.S. 923 (1970); *Carlough v. Richardson*, 399 U.S. 920 (1970); *Sumrall v. Kidd*, 394 U.S. 215 (1969) (*per curiam*); *Dahl v. Republican State Comm.*, 393 U.S. 408 (1969) (*per curiam*); *Stamler v. Willis*, 393 U.S. 407 (1969) (*per curiam*); *Skolnick v. Bd. of Comm'rs*, 389 U.S. 26 (1967) (*per curiam*); *Canton Poultry, Inc. v. Conner*, 388 U.S. 458 (1967) (*per curiam*).

included a majority of the current Justices—namely, Justices Scalia, Kennedy, Thomas, Ginsburg, and Breyer. This Court did so to enable a timely circuit court appeal of an attorneys' fee issue, where the appellants had erroneously invoked a broadly worded direct appeal provision in a federal voting rights law, thereby causing the time for appealing the fee issue to the Fourth Circuit to elapse. *See Franklin*, 516 U.S. at 801; *Crespin*, 101 F.3d at 124-25. Indeed, this Court provided the equitable vacatur relief *sua sponte*, because the appellants in *Franklin* did not even respond to the appellees' motion to dismiss.

4. Congress, moreover, has ratified the legitimacy of the equitable vacatur practice. This Court's rule is that "Congress ratifie[s]" a "well-established judicial interpretation" when it "leave[s] [it] intact" while "comprehensively revis[ing]" a relevant statutory scheme. *See, e.g., Herman & MacLean v. Huddleston*, 459 U.S. 375, 384-86 (1983). And that is precisely what happened with respect to the equitable vacatur practice.

As noted, the vacatur practice is an exercise of this Court's "supervisory appellate power" to "dispos[e] of [a] case as justice requires" even when "it is without power to proceed with the appeal" on the merits. *Walling*, 321 U.S. at 676. At the time *Gully* adopted the practice in 1934, the Congressional statute governing this Court's supervisory power read as follows:

> The Supreme Court may affirm, modify, or reverse any judgment, decree, or order of a district court lawfully brought before it for review, or may direct such judgment, decree,

> or order to be rendered, or such further proceedings to be had by the inferior court, as the justice of the case may require....

28 U.S.C. § 876 (1934 ed. Supp. I); *see also* Rev. Stat. § 701 (1875 ed.). Between 1934 and 1948, this Court applied the equitable vacatur practice at least 8 times. *See supra* at 12-15, 15 n.4, 16 n.8.

Then, in 1948, Congress comprehensively revised Title 28 of the U.S. Code. *See* Pub. L. No. 80-773, ch. 646, 62 Stat. 869. In doing so, Congress made two material changes—italicized below—to the provision that governed (and still governs) this Court's "supervisory appellate power":

> The Supreme Court *or any other court of appellate jurisdiction* may affirm, modify, *vacate, set aside* or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

28 U.S.C. § 2106 (emphases added).

If Congress had merely "le[ft] ... intact" the equitable vacatur practice that this Court had already established, that itself would have been sufficient to establish statutory ratification of the remedy. *Huddleston*, 459 U.S. at 386. But Congress went further still, for the two material changes that it did make affirmatively support the legitimacy of the remedy and its applicability here: *first*, Congress confirmed the power to "vacate" or "set aside" the judgment under review; and *second*, Congress confirmed that circuit courts, no less than this Court,

possess supervisory appellate power over cases before them.

Accordingly, while *Bowles* properly noted that "Congress may authorize courts to promulgate rules that excuse compliance" with § 2107 if displeased with the result there, *see* 551 U.S. at 214, this Court was not informed that Congress has *already* authorized equitable vacaturs that prospectively cure noncompliance with § 2107, by "le[aving] undisturbed" the "long line of this Court's decisions" employing the vacatur practice, *Reed Elsevier*, 130 S. Ct. at 1251 (Ginsburg, J., concurring in part and concurring in the judgment).

5. To be sure, this Court's longstanding practice of "vacat[ing] the district court judgment and remand[ing] the case for the entry of a fresh decree from which [a timely] appeal may be taken" is not "statutorily or otherwise compelled." *Norton v. Mathews*, 427 U.S. 524, 531 (1976). It is purely an equitable exercise, in "cases where the jurisdictional issue was previously unsettled," *id.*, of this Court's "supervisory appellate power," *Walling*, 321 U.S. at 676. But it is striking how freely this Court has dispensed such equity when reasonable mistakes would otherwise have led to the result that an appellant was jurisdictionally foreclosed from filing a timely appeal in a circuit court.

First, Petitioners have identified at least 50 different cases over 60 years in which this Court has protected appellants from the consequence of their reasonable jurisdictional errors. *See supra* at 12-17 & nn.4-9. Indeed, during that period, 36 different Justices have been members of this Court, 30 of them have joined at least one opinion employing the

equitable vacatur practice—including a majority of the current Justices—and no Justice has ever questioned the practice, let alone has this Court ever held that it should not be used.

Second, this Court has set a relatively low bar for entitlement to such equitable relief. It has granted vacatur so long as "the question of jurisdiction was not obviously settled by prior decisions." *Phillips*, 312 U.S. at 254. Thus, while mistaken appellants have received relief when they reasonably relied on settled precedent that was subsequently abrogated, *see, e.g.*, *Gonzalez v. Automatic Emps. Credit Union*, 419 U.S. 90, 95, 99-101 (1974); *Pa. Pub. Util. Comm'n v. Pa. R.R. Co.*, 382 U.S. 281, 282 (1965) (*per curiam*), they also have received relief simply because the jurisdictional question had been open, *see, e.g.*, *Bd. of Regents of Univ. of Texas Sys. v. New Left Educ. Project*, 404 U.S. 541, 543-45 (1972); *Okla. Gas & Elec. Co.*, 292 U.S. at 390-92.

Finally, this Court has provided equitable vacatur relief even if the mistaken appellant failed to ask for such relief. Based on the available briefing from the 50 cases cited herein, Petitioners are aware of only 5 cases where the putative appellant affirmatively requested vacatur if this Court was barred from reaching a decision on the merits.[10]

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[10] *See* Appellants' Supplement to Jurisdictional Statement at 2, *Clinton v. Jeffers*, 503 U.S. 930 (1992) (No. 91-1210); Jurisdictional Statement at 9-10, *Gustafson v. Hoffman*, 429 U.S. 806 (1976) (No. 75-1672); Brief in Opposition to the Motion to Dismiss at 7, *United States v. Belt*, 319 U.S. 521 (1943) (No. 919); Brief of Appellants at 25, *Phillips v. United States*, 312 U.S. 246 (1941) (No. 201); Brief for Appellant at 26, *William Jameson & Co. v. Morgenthau*, 307 U.S. 171 (1939) (No. 717).

Indeed, in at least two cases where the appellant did not raise the vacatur remedy until after this Court had issued an opinion simply dismissing the appeal, this Court took the extraordinary step of withdrawing the opinion and replacing it with one that granted the vacatur remedy. *See Hutcherson v. Lehtin*, 400 U.S. 923 (1970); *Stamler v. Willis*, 393 U.S. 407 (1969) (*per curiam*).

C. The Courts Of Appeals Should Be Allowed To Invoke The Equitable Tradition Of Vacating And Remanding For Entry Of A Fresh Judgment When A Jurisdictionally Untimely Appeal Is Caused By A Judicial Error

This Court's vacatur practice in its direct appeal jurisprudence proves that a court lacking appellate jurisdiction is not powerless to provide an equitable remedy that prospectively cures reasonable noncompliance with a jurisdictional time limit for taking an appeal. And it follows *a fortiori* that the Courts of Appeals should be able to apply the same practice when reasonable reliance on judicial error causes an appellant's noncompliance with the jurisdictional time limit in § 2107.

First, there is no material distinction between the appellants in this Court's equitable vacatur cases and appellants like Petitioners and Bowles. In both situations, a putative appellant has missed the jurisdictional time limit for taking an appeal to the circuit court that has proper appellate jurisdiction. In both situations, the cause of that untimeliness is that the judiciary has failed to provide unambiguous and correct guidance on the relevant jurisdictional rules. And in both situations, a court that lacks appellate jurisdiction to resolve the case on the

merits still retains supervisory appellate power to dispose of the case justly, including by vacating and remanding for entry of a fresh judgment that will restart the time for taking an appeal.

Second, the Courts of Appeals arguably have *greater* justification for awarding such relief than does this Court in its direct appeal jurisprudence. After all, the Ninth Circuit here is at least the federal appellate court that has statutory appellate jurisdiction over a case of this type, *see* 28 U.S.C. § 1291, even if it cannot exercise that jurisdiction due to Petitioners' noncompliance with the time limit in § 2107. By contrast, in this Court's equitable vacatur cases, this Court is not even the correct appellate court to review the district court's judgment, *see* 28 U.S.C. §§ 1253, 1254, yet it still provides relief. To put the matter differently, if this Court's complete lack of appellate jurisdiction does not prevent it from providing equitable vacatur relief that facilitates a timely appeal in the Ninth Circuit, then surely the Ninth Circuit's limited lack of appellate jurisdiction here does not prevent it from providing the same relief. Indeed, it would be absurd if Petitioners would have been better off missing § 2107's time limit by mistakenly filing a direct appeal in this Court, rather than by reasonably relying on Ninth Circuit precedent construing § 2107 that this Court subsequently abrogated.

Third, untimely appellants who have reasonably relied on judicial error have a far greater equitable claim to vacatur relief than many of the mistaken appellants in this Court's vacatur cases. Unlike Petitioners, who relied on controlling precedent that was later overruled, *see supra* at 2-4, or Bowles, who

relied on an order of a federal judge that was in error, *see supra* at 7-8, the mistaken appellants in this Court's vacatur cases often simply made the wrong choice when confronted with an unresolved jurisdictional question, *see supra* at 21. Indeed, prudent appellants in those circumstances could have filed a protective appeal in the circuit court, *see, e.g.*, *Pa. Pub. Util. Comm'n*, 382 U.S. at 282, whereas appellants like Petitioners and Bowles had no reason to doubt the timeliness of their appeals, which complied with binding judicial decrees.

Finally, this Court's equitable vacatur practice for prospectively curing jurisdictionally defective appeals is a more established tradition than was the tradition cited in *Bowles* of treating statutory time limits for appealing as jurisdictional in the first place. *Bowles* cited a mere seven cases from this Court to establish the practice of treating the civil appeal time limit as jurisdictional. *See* 551 U.S. at 209-10. Some have questioned whether all seven cases fully supported that conclusion. *See* Scott Dodson, *The Failure of* Bowles v. Russell, 43 Tulsa L. Rev. 631, 635-38 (2008). Regardless, however, those seven cases pale in comparison to the 50 different cases cited above in which 30 different Justices of this Court have repeatedly demonstrated that courts lacking appellate jurisdiction still possess the power to award equitable non-merits relief that prospectively cures a jurisdictionally untimely appeal. Given that this Court relied so heavily on tradition in *Bowles* when treating statutory time limits for appeals as jurisdictional, it should now readily reaffirm and embrace the much more established appellate tradition of providing equitable

vacatur relief that prospectively cures jurisdictionally untimely appeals.[11]

II. THIS IMPORTANT ISSUE OF FEDERAL JURISDICTIONAL PRACTICE WARRANTS THIS COURT'S IMMEDIATE RESOLUTION

This Court has often granted certiorari in order to "exercise ... [its] supervisory powers," *Nguyen v. United States*, 539 U.S. 69, 73-74 (2003), "in cases involving [issues of] federal jurisdiction, practice, and procedure" that are of sufficient "importance," Gressman, *supra*, § 4.15 at 273. For at least two reasons, this case warrants such treatment.

First, in recent years, this Court has increasingly recognized the importance of reviewing jurisdictional holdings, even in the absence of a circuit split, when those holdings would deprive litigants of their right to invoke equity or to waive defenses. *Bowles* itself was precisely such a case. *See* 551 U.S. at 207-08. And so is *Henderson v. Shinseki*, 130 S. Ct. 3502 (2010), in which this Court is currently reviewing the Federal Circuit's extension of *Bowles* to untimely appeals in Veterans Court, belated filings which often present compelling equitable justifications from disabled soldiers.

Reed Elsevier perhaps best exemplifies the vigor with which this Court has reviewed potential over-reliance by lower courts on a "jurisdictional" characterization. There, the Second Circuit had refused to allow a settlement of a copyright class-

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[11] Notably, it does not appear that any of the seven "jurisdictional" cases cited in *Bowles* involved circumstances that would have called for an exercise of this Court's equitable vacatur practice. *See* Dodson, *supra*, at 635-38.

action, reasoning that some of the settled claims involved unregistered copyrights despite "widespread agreement among the circuits" that the registration requirement was a "jurisdictional" bar to copyright claims. *See* 130 S. Ct. at 1242-43. Perhaps because of that "widespread agreement," the petitioners in seeking certiorari did not even dispute that the registration requirement was jurisdictional, instead arguing merely that federal courts can enter comprehensive settlements even if some of the settled claims would have been jurisdictionally barred had they been litigated on the merits. *See* Petition for a Writ of Certiorari at i, 11-31, *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237 (2010) (No. 08-103). Despite the failure of the petitioners to raise the issue, however, this Court *sua sponte* "formulated the question presented to ask whether [the registration requirement] restricts the subject-matter jurisdiction of the federal courts over copyright infringement actions," and it then proceeded to overrule the "widespread agreement among the circuits" that the requirement was jurisdictional. *See* 130 S. Ct. at 1243-47. Notably, this Court also took that self-created opportunity to distinguish and cabin *Bowles* based on this Court's traditional treatment of § 2107. *See id.* at 1247-48; *see also id.* at 1250-51 (Ginsburg, J., concurring in part and concurring in the judgment).

Here, as in *Bowles*, *Henderson*, and *Reed Elsevier*, the need for "an exercise of this Court's supervisory powers" is critical. *Nguyen*, 539 U.S. at 74. This Court should reaffirm an important principle of federal jurisdictional practice that its decision in *Bowles* has unfortunately obscured: the lack of "power to proceed with [an] appeal" does not

strip a court of its "supervisory appellate power" to "dispos[e] of the case as justice requires." *Walling*, 321 U.S. at 676.

Second, the omission in the parties' briefing in *Bowles* caused this Court to effect a significant alteration in the legal landscape based, unwittingly, on a "'less than accurate' historical analysis" that "contradicted an 'unbroken line of decisions,'" which is the type of oversight that justifies reviewing the scope of recent precedent. *See United States v. Dixon*, 509 U.S. 688, 711-12 (1993) (quoting *Solorio v. United States*, 483 U.S. 435, 439, 442 (1987)); *see also Eberhart v. United States*, 546 U.S. 12, 13-15, 19-20 (2005) (*per curiam*) (granting certiorari when the Seventh Circuit's erroneous belief that it was required to treat a rule as "jurisdictional" was "an error shared among the circuits ...[and] caused in large part by imprecision in [this Court's] prior cases"). Prior to *Bowles*, equitable relief from § 2107 was available under the "unique circumstances" doctrine. *See Bowles*, 551 U.S. at 213-14. To be sure, that doctrine was technically an "illegitimate" means of dispensing equity since it permitted a merits adjudication while purporting to excuse noncompliance with a jurisdictional rule. *See id.* at 214. That defect in form, however, could have been fixed in *Bowles* if only this Court had been made aware of its legitimate and longstanding tradition of using vacatur as a non-merits disposition that prospectively cures a jurisdictionally untimely appeal. But because this Court instead was presented with the false dichotomy between dismissing the untimely appeal or allowing its adjudication on the merits, it felt constrained to affirm the Sixth Circuit's "inequitable" dismissal of

Bowles' appeal. *See id.* at 214-15. That unfortunate perception in turn led the Ninth Circuit here wrongly to believe that "dismissal of [Petitioners'] appeal[]" was "require[d]" and that "remand would be futile." Pet.App. 2a-3a. This Court should seize the opportunity to fix the misperception created as a result of the inadequate briefing in *Bowles*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA and STATE OF CALIFORNIA, *ex rel.* Dr. KATHERINE R. O'CONNELL; et al., Plaintiffs – Appellants, and DANIEL ROBERT BARTLEY, Realtors' Counsel, Appellant, v. CHAPMAN UNIVERSITY, Defendant – Appellee.	No. 07-56864 D.C. No. CV-04-01256-PSG Central District of California, Los Angeles

FILED

AUG 17 2010

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA and STATE OF CALIFORNIA, *ex rel* Dr. KATHERINE R. O'CONNELL; et al., Plaintiffs – Appellees, and	No. 08-55275 D.C. No. CV-04-01256-PSG Central District of California, Santa Ana

DANIEL ROBERT BAILEY, Realtors' Counsel, Appellee, v. CHAPMAN UNIVERSITY, Defendant – Appellant.	ORDER

Before: REINHARDT, TASHIMA and WARDLAW, Circuit Judges.

Realtors Drs. Katherine O'Connell, Chris Moyers, and Carlee Durfor ("Realtors") appeal from the entry of summary judgment in favor of Chapman University ("Chapman"). Chapman appeals from the district court's denial of a request for a fee or sanction award.

These consolidated appeals were stayed pending the issuance of the mandate in *United States ex rel. Haight v. Catholic Healthcare West*, 602 F.3d 949 (9th Cir. 2010), which acknowledged the overruling of prior Ninth Circuit precedent by the Supreme Court's decision in *United States ex rel. Eisenstein v. City of New York*, 129 S. Ct. 2230 (2009). In *Eisenstein*, the Supreme Court determined that in False Claims Act *qui tam* actions in which the United States has declined to intervene, the 30-day period for filing a notice of appeal applied, rather than the extended 60-day period applicable in actions involving the United States as a party.

Eisenstein applies retroactively and requires dismissal of these appeals. *See* 129 S. Ct. at 2236

n.4; *Haight*, 602 F.3d at 953. Relators' notice of appeal was filed on December 21, 2007, 58 days after the October 24, 2007 entry of summary judgment in favor of Chapman. Chapman's notice of appeal was filed on February 7, 2008, 47 days after the December 12, 2007 entry of judgment denying Chapman's motion for fees or sanctions.

Haight forecloses Relators' request for relief from this court pursuant to Federal Rules of Appellate Procedure 2, 4 and 26. *Id.* at 956. *Haight* also conclusively determines Relators' claim that the change in law wrought by *Eisenstein* violates due process. *Id.* at 954. Finally, because the district court is prohibited from construing Relators' notice of appeal as a motion for an extension of time to file a notice of appeal, remand would be futile and we decline to do so. *See id.* at 957, citing *Pettibone v. Cupp*, 666 F.2d 333, 335 (9th Cir. 1981).

Accordingly, Relators' "Motion for Rule 4(a)(5)(A)(ii) Relief" is denied and Chapman University's motion to dismiss is granted.

Relators' counsel's appeal from the district court's order denying the "Motion for Rule 76(a) Ruling Setting Aside as Erroneous the Magistrate Judge's Order Assessing Monetary Sanctions Against Relators' Counsel," part of appeal No. 07-56864, was timely filed. Within 21 days of the date of this order, Relators' counsel shall move for voluntary dismissal or file a notice that he intends to prosecute this appeal. Failure to comply with this order will result in the automatic dismissal of this appeal by the Clerk for failure to prosecute. *See* 9th Cir. R. 42-1.

APPEAL NO. 07-56864 DISMISSED in part; APPEAL NO. 08-55275 DISMISSED in its entirety.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES — GENERAL

Case No.	SA CV 04-1256 PSG (RCx)	Date	October 23, 2007
Title	United States of America and State of California, *ex rel.* Dr. Katherine O'Connell, et al v. Chapman University, *et al.*		

Present:	The Honorable Philip S. Gutirrez, United States District Judge

Wendy K. Hernandez	Not Present	n/a
Deputy Clerk	Court Reporter	Tape No.

Attorneys Present for Plaintiff(s): Not Present	Attorneys Present for Defendant(s): Not Present

Proceedings: (In Chambers) Order GRANTING Defendant's Motion for Summary Judgment

Presently pending before the Court is Defendant Chapman University's ("Chapman" or "Defendant") Motion for Summary Judgment, or in the alternative, Partial Summary Judgment or For an Order Specifying Material Facts Without Substantial

Controversy.[1] After considering the moving and opposing papers, as well as oral arguments at the hearing on October 22, 2007, the Court hereby GRANTS Defendant's Motion for Summary Judgment.

I. BACKGROUND

A. The Parties

Defendant Chapman is an institution of higher learning offering undergraduate, graduate and professional programs at its campus in Orange, California. (Motion at 1.) Chapman also offers working adults a range of bachelors degrees, master's degrees and teaching credentials through its University College academic centers. (Id.) Chapman currently operates 27 academic centers in California and Washington, 7 of which are located on military installations. (Warner Dec. ¶ 3.)

Plaintiffs in this action are Dr. Katherine O'Connell, Dr. Carlee Durfor and Dr. Chris Moyers (collectively "Relators"), all former adjunct faculty who taught at Chapman's academic centers.

B. Federal Financial Assistance Programs

Chapman participates in Federal Student Financial Assistance ("FSFA") program under Title IV of the Higher Education Act ("HEA"), 20 U.S.C. § 1070, *et seq.* Pursuant to the HEA, educational institutions like Chapman, who wish to receive federal subsidies under Title IV, must enter into a Program Participation Agreement ("PPA") with the

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[1] Both Plaintiff and Defendant have submitted requests for judicial notice. The Court denies these requests, finding them unnecessary for a decision on the merits.

Department of Education ("DOE"). (Ball Dec. ¶ 4; Exs. A-E.) Each PPA expressly incorporates the HEA statutory language conditioning a school's "initial and continuing" eligibility to receive Title IV funds on compliance with the HEA statutory requirements, including the requirement that the institution be regionally accredited. 34 C.F.R. § 668.14(b)(23). If an institution violates the PPA, the DOE may terminate the school's eligibility to participate in the programs for "failure to demonstrate administrative capability." 34 C.F.R. §§ 668.14, 668.16. These programs include the Pell Grant, 20 U.S.C. § 1070a, Perkins Loan, 20 U.S.C. § 1087aa, College Work Study, 42 U.S.C. § 2751, Supplemental Educational Opportunity Grant, 20 U.S.C. § 1070b, and the Guaranteed Student Loan Programs, 20 U.S.C. §§ 1070a, 1078-2 and 1078. (Ball Dec. Exs. A-E.)

1. Accreditation

20 U.S.C.A. § 1094(a)(21) requires educational institutions receiving Title IV funds to "meet the requirements established by the Secretary and accrediting agencies or associations . . ." The DOE recognizes only those accrediting associations that demonstrate standards for accreditation "that are sufficiently rigorous to ensure that the agency is a reliable authority regarding the quality of the education or training provided by the institutions or programs it accredits." 34 C.F.R. 602.16(a); 20 U.S.C. § 1099b. Chapman, which has been accredited continually since 1956, is accredited by the Accrediting Commission for Senior Colleges and Universities of the Western Association of Schools and Colleges ("WASC"), one of six regional

accreditation associations recognized by the DOE. (Fite Dec. ¶¶ 3, 5.) WASC first accredited Chapman in 1962, and conducted its most recent accreditation review in 2005, reaffirming Chapman's accreditation for an additional eight years. (Fite Dec. ¶ 5, Ex. A.)

2. WASC Accreditation Process

WASC's current accreditation process involves a three-stage, sequential institutional review process. (Fite Dec., Ex. B at D 027380.) An educational institution receives a status of accreditation only if WASC determines it has:

1. Demonstrated that it meets the Core Commitments to Institutional Capacity and Educational Effectiveness;
2. Conducted a self-review under the Accreditation Standards, developed and presented indicators of institutional performance, and identified areas for needed improvement to serve as an evidentiary basis for completing successfully the three-stage process of institutional review;
3. Developed an approved Institutional Proposal for Accreditation Review, and been evaluated by teams of external evaluators in the Preparatory and Educational Effectiveness Review Processes;
4. Demonstrated to the Commission that it meets or exceeds the expectations of the Accreditation Standards; and
5. Committed itself to institutional improvement, periodic self-evaluation, and continuing compliance with Commission Standards, Policies, Procedures and Decisions.

(Id. at D 027387.) Once WASC concludes that an institution meets its standards, it grants accreditation for a specified period of time, and continuing accreditation depends on periodic reevaluations by WASC. (Fite Dec., Ex. B at D 027408-027423, Ex. C at D 017475-017476.) If WASC determines an institution does not meet its standards, it may impose an array of formal sanctions, including issuing warnings, imposing probation, issuing an order to show cause, or terminating accreditation. (Id., Ex. B at D 027425.) WASC must allow the institution up to two years to correct the failure. (Id. at D 027427.)

B. State Financial Assistance Programs

The State of California offers Cal Grants to qualifying California students under a program administered by the California Student Aid Commission ("CSAC"). Cal. Ed. Code § 69535. In order to participate in California student grant programs, an institution must sign an Institutional Participation Agreement ("IPA"), in which it certifies that it participates in two of three campus based federal student programs, and that its students participate in the Federal Pell Grant program. Cal. Ed. Code §§ 69432.7(*l*),69535(*l*).

C. United States Department of Defense Programs

The United States Department of Defense ("DOD") also has programs for payment of tuition for qualifying students, via the GI Bill and the Armed Forced Tuition Assistance Program, a benefit for eligible members of the Army, Navy, Marines, Air Force and Coast Guard. Chapman contracts with several military installations to provide on-base

teaching. (Warner Dec. ¶ 4.) These programs are governed by individual Memoranda of Understanding ("MOU's") which usually contain a contractual obligation that Chapman "maintain full accreditation with all regional accrediting associations, as applicable." (Warner Dec. ¶ 4; Bartley Dec. Ex. 15 at D 8157; see also Exs. 16-30.) In particular, the Air Force's MOU requires Chapman to adhere to Air Force "Quality Educational Standards," including the following:

> Classroom contact hours will be at least 45 hours per 3 semester hour course (or quarter hour equivalent) or in a format the equates to the traditional Carnegie unit of instruction — 45 total hours equaling 1 semester hour of credit (normally 15 class contact hours plus 30 hours of study/research outside the classroom).
>
> Key Areas of Concern:
>
> 1. Inadequate classroom contact hours.
> 2. Inadequate hours of assigned outside study/research.

(Bartley Dec. Ex. 15 at D 7233.) The U.S. Navy and the U.S. Army MOU's contain similar contractual language requiring Chapman to adhere to course descriptions set forth in its course catalogs and schedules. (Bartley Dec. Exs. 27-20.)

D. The Second Amended Complaint

On September 28, 2004, Relators filed a *qui tam* whistleblower action against Chapman.[2] The

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[2] Under the False Claims Act, a private individual (a "relator") may bring an action (referred to as a "*qui tam* action") on behalf of the United States against any individual or company who

Complaint alleged two causes of action under the Federal False Claims Act ("FCA"), two causes of action under the California False Claims Act ("CFCA") (collectively "FCA claims"), and one cause of action under the California Unfair Competition Law ("UCL"). On April 3, 2006, Relators filed a Second Amended Complaint ("SAC"), adding two new claims for injury and damages for employment retaliation in violation of 31 U.S.C. § 3730(h), and for employer interference with employee disclosure and retaliation in violation of Cal. Gov. Code § 12653.

In the SAC, Relators allege that "Chapman University, via express and implied certification, regarding the number of classroom hours being taught to students, [obtained] hundred of millions of dollars in student tuition funding annually from the United States Department of Education and the United States Department of Defense, from at least October 18, 1994 through the present." (SAC ¶ 2.) Specifically, Relators alleged that "incident to requesting and receiving hundreds of millions of dollars in federal and state funding annually, [Chapman] falsely certified to the United States of America and the State of California, every year, that they are in compliance with federal provisions requiring that instruction meet certain minimum clock-hour requirements." (SAC ¶ 6.) Relators allege that WASC requires Chapman to maintain:

> a program of General Education that is integrated throughout the curriculum including the upper division level, consisting

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has knowingly presented a false or fraudulent claim to the United States government.

> of a minimum of 45 hours semester credit hours (or the equivalent), together with a significant study in depth in a given area of knowledge (typically described in terms of a major).

(SAC ¶ 24.) According to Relators, WASC's definition of "unit of credit" sets forth the minimum requirement of 45 hours. (SAC ¶ 24.) The SAC alleges that certain officials at Chapman had actual knowledge of these false certifications, or acted with deliberate indifference and/or reckless disregard as to the truth or falsity of the claims. (Id., ¶ 7.)

On May 23, 2006, the Court dismissed Relators' unfair competition, employment retaliation and employer interference claims. The Court also limited Relators to a "false certification" theory of liability with respect to the four, remaining federal and California FCA claims (Counts 1-4). Chapman now moves for summary judgment, or in the alternative partial summary judgment or for an order specifying material facts without substantial controversy.

II. LEGAL STANDARD FOR SUMMARY JUDGMENT

Federal Rule of Civil Procedure 56(c) establishes that summary judgment is proper only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party has the burden of demonstrating the absence of a genuine issue of fact for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). If the

moving party satisfies the burden, the party opposing the motion must set forth specific facts showing that there remains a genuine issue for trial. *Id.* at 257.

A non-moving party who bears the burden of proving at trial an element essential to its case must sufficiently establish a genuine dispute of fact with respect to that element or face summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S, Ct. 2548 (1986). Such an issue of fact is a genuine issue if it reasonably can be resolved in favor of either party. *Anderson*, 477 U.S. at 250-51.

If the moving party seeks summary judgment on a claim or defense for which it bears the burden of proof at trial, the moving party must use affirmative, admissible evidence. Admissible declarations or affidavits must be based on personal knowledge, must set forth .facts that would be admissible evidence at trial, and must show that the declarant or affiant is competent to testify as to the facts at issue. Fed. R. Civ. P. 56(e).

III. DISCUSSION

Relators allege four types of false certification: (1) false certifications to WASC about compliance with class hour accreditation standards (SAC ¶ 42); (2) false certifications in the PPA that Chapman meets WASC accreditation standards (SAC ¶ 43); (3) false certifications in the MOUs about compliance with the WASC standards (SAC ¶ 44); and (4) false certifications to CSAC about compliance with WASC standards (SAC ¶ 45).

The purpose of the False Claims Act is "to provide for restitution to the government of money taken from it by fraud." *United States v. Hess*, 317

U.S, 537, 551, 63 S,Ct. 379 (1943). The FCA imposes liability on one who "knowingly presents" to the United States government "a false or fraudulent claim for payment." 31 U.S.C. §§ 3729(a); 3730(b)(1). Under the false certification theory, FCA liability may be found where a party falsely certifies compliance with a statute or regulation that is a condition of receiving a government benefit, followed by receipt of the benefit based on the false certification. *U.S. ex rel. Hendow v. University of Phoenix*, 461 F.3d 1166, 1171 (9th Cir. 2006). Establishing a prima facie case of false certification requires a plaintiff to prove: (1) a false statement or fraudulent course of conduct, (2) made with scienter, (3) that was material, causing (4) the government to payout money or forfeit moneys due. *Hendow*, 461 F.3d 1171 (citations omitted).

Like the federal FCA, the California FCA imposes liability on any person who "knowingly presents or causes to be presented to an officer or employee of the state or of any political subdivision thereof, a false claim for payment or approval." Cal. Gov't Code § 12651. Since California's FCA is patterned on the federal statutory scheme, the requirements for state liability are the same as for federal liability. *See State ex rel. Grayson v. Pac. Bell Tel. Co.*, 142 Cal.App.4th 741, 747 n.3 (2006); *see also United States v. Shasta Servs., Inc.*, 440 F.Supp.2d 1108, 1111 (E.D.Cal. 2006).

A. Federal FCA Claim

1. False Statement

(a) Federal Student Financial Assistance Program

The first element of a false certification claim requires Relators to prove the existence of a false statement or fraudulent course of conduct. *Hendow*, 461 F.3d at 1171. Relators contend that through WASC's accreditation, Chapman falsely certified its compliance with HEA requirements via its PPA's, via its annual audit reports to the DOE, and via its IPA's to the CSAC. (Opp'n at 3.) Relators' theory is that the accreditation information contained in these documents is false, because Chapman has not complied with the Carnegie standard of hours, the commonly accepted uniform measure of a academic achievement in the U.S. According to Relators, the Carnegie hour consists of 50 minutes of faculty-student contact time coupled with an adjacent 10 minute break. (Amended Opp'n at 12.)[3] Thus, a 3-credit course entails 45 Carnegie hours. (Id.) Relators contend that DOE requires strict adherence with the Carnegie hour, and the Chapman failed to comply with the Carnegie hour by its "systematic and chronic practice" of permitting its faculty members to close classes early where the professor elects to teach a multi-hour class without breaks, to justify counting clock hours in 50-minute increments.

In response, Chapman contends the accrediting agency, WASC, has no requirement of a quantum of classroom hours. Therefore, Relators cannot

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[3] In explaining the Carnegie standard, Relators cite to Ex. F, an article entitled "The History of the Student Credit Hour," attached to their request for judicial notice. The Court finds no mention in Exhibit F of the Relators' statements regarding the Carnegie standard. However, other exhibits, such as Ex. 11 attached to the Bartley Dec., support Relators' definition of the Carnegie hour.

establish a false statement that is a condition of government funding. As support for its contention, Chapman cites *U.S. ex rel Diop v. Wayne County Community College Dist.*, 242 F.Supp.2d 497 (E.D.Mich.2003), where the court, addressing this very issue, granted summary judgment in favor of the defendant community college.[4]

In *Diop*, the plaintiff claimed a community college falsely certified compliance with FSFA provisions when the college chancellor stated, "I hereby certify that, to the best of my knowledge and belief, all information in this document is true and correct." *Id.* at 523. Relying on 20 U.S.C. § 1094, which requires an institution participating in the FSFA program to meet the requirements established by the accrediting agencies, plaintiff argued that the college's accreditation information in its FSFA application was false.[5] *Id.* Specifically, plaintiff

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[4] In his Order Granting in Part and Denying in Part Defendant's Motion to Dismiss the Second Amended Complaint, Judge Selna declined to consider *Diop* because it dealt with a motion for summary judgment. (See May 23, 2006 Minute Order at 5, fn. 2.) As we are now at the summary judgment stage of litigation, the Court finds *Diop* appropriate for discussion.

[5] 20 U.S.C.A. § 1094(a)(21) provides that the PPA agreement shall:

. . .condition the initial and continuing eligibility of an institution to participate in a program upon compliance with the following requirements:

. . .

(21) The institution will meet the requirements established by the Secretary and accrediting agencies or associations, and will provide evidence to the Secretary that the institution has the authority to operate within a State.

claimed that because the chemistry labs were ill-equipped and lacked adequate materials, the college could not be properly accredited. *Id.*

The *Diop* court rejected plaintiff's argument, reasoning that 20 U.S.C. § 1094 expressly delegates the task of insuring the educational viability of institutions of higher education to private accreditation agencies. *Id.* The court found that nothing in the accreditation statute required the college to have ascertained whether the accrediting agency considered the adequacy of the chemistry labs in granting accreditation. *Id.* Importantly, the court declined to be put in the position of determining whether the education offered to the college's students was adequate, since doing so would usurp the statutory role of the accrediting agency in assessing the quality of education offered for FSFA purposes. *Id.*

We find the court's reasoning in *Diop* to be persuasive. Like the plaintiff in *Diop*, Relators contend that Chapman falsely represented compliance with the Carnegie standard, via reports and other communications to WASC, in order to receive accreditation. Specifically, Relators assert that Chapman has a "systematic and chronic practice" of not complying with the Carnegie standard of hour. However, 20 U.S.C. § 1094(a)(2) merely requires Chapman to "meet the requirements established by the accrediting agencies or associations." According to WASC, Chapman has met these requirements. WASC has continually accredited Chapman since 1962, and in 2005, reaffirmed Chapman's accreditation for a period of 8 years. (Fite Dec. ¶ 5; Ex. A.) Chapman's evidence

shows that WASC does not require Chapman to disclose information regarding classroom hours, contact hours or clock hours (Fite Dec. ¶ 7), and Relators have identified no WASC provision to dispute this. In the absence of any WASC requirement of a quantum of classroom hours, Relators cannot establish a false statement that is a condition of government funding. As recognized by the court in *Diop*, the HEA imposes no affirmative duty on Chapman to insure accreditation standards are unfailingly maintained, and no FCA claim can be maintained based on standards that are not a prerequisite to payment of government funds. *Id.* at 523-524.

Plaintiff nevertheless argues, that pursuant to 34 C.F.R. § 668.8(k) and (l), the DOE requires strict adherence to the Carnegie standard.[6] This

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[6] Sections § 668.8(k) and (l) provide:

(k) Undergraduate educational program in credit hours. If an institution offers an undergraduate educational program in credit hours, the institution must use the formula contained in paragraph (l) of this section to determine whether that program satisfies the requirements contained in paragraph (c)(3) or (d) of this section, and the number of credit hours in that educational program for purposes of Title IV, HEA programs, unless—

(1) The program is at least two academic years in length and provides an associate degree, a bachelor's degree, a professional degree, or an equivalent degree as determined by the Secretary; or

(2) Each course within the program is acceptable for full credit toward that institution's associate degree, bachelor's degree, professional degree, or equivalent degree as determined by the Secretary, provided that the institution's degree requires at least two academic years of study.

(l) Formula. For purposes of determining whether a program described in paragraph (k) of this section satisfies the

regulation, however, applies to propriety schools, and expressly exempts from its coverage degree-granting institutions such as Chapman. Most of Chapman's undergraduate program are four-year bachelor programs, and all of its undergraduate programs result in at least an associate degree and are at least two years in length. (Knight Dec. ¶¶ 2-4.) Thus, with respect to the first element of an FCA cause of action, Relators have failed to raise a genuine issue of material fact as to whether Chapman made a false statements via its PPAs and its annual audit reports to the DOE.

(b) False Statement – MOU

Relators also contend that Chapman falsely certified its compliance with MOU standards to the Department of Defense, which provides tuition assistance via the GI Bill and Tuition Assistance Program. They argue that the MOD's requires strict adherence with the Carnegie standard. For example, the Air Force's MOD requires Chapman to certify that it adheres to Air Force Quality Education Standards. These standards state, in relevant part:

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requirements contained in paragraph (c)(3) or (d) of this section, and the number of credit hours in that educational program with regard to the Title IV, HEA programs—

(1) A semester hour must include at least 30 clock hours of instruction;

(2) A trimester hour must include at least 30 clock hours of instruction; and

(3) A quarter hour must include at least 20 hours of instruction.

34 C.F.R. § 668.8(k) and (l).

> The Air Force has adopted the Carnegie unit of instruction to establish minimum levels of course contact and preparation, study, and research time outside the classroom. Specifically, for each semester hour of credit, there will be 15 hours of classroom contact (50 minutes of instruction with a 10 minute break each hour) and 30 hours of outside preparation, study and research.

(Bartley Dec., Ex. 18 at D 7096.)

Nevertheless, unlike the PPAs, which Chapman must sign in order to receive Title IV funding, the MOUs on their face are not related to federal or state assistance programs such as Tuition Assistance or GI Bill funding. The MOUs neither enable Chapman to accept Tuition Assistance funding, nor do they qualify Chapman to participate in the Tuition Assistance Program (UF ¶ 19.)[7] Moreover, the only payment information Relators have submitted – an invoice by Chapman to Tuition Assistance for a course given on a military base (Bartley Dec. Ex. 19) – fails to establish a link between the MOU and the Tuition Assistance Program. In contrast, Chapman's evidence shows that the main purpose of the MOUs

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[7] Relators object to this fact, arguing it is immaterial whether Chapman's execution of the MOUs with the individual military installations is an *express* condition of its participation in the Tuition Assistance program and GI Bill, since at the very least, execution of the MOUs is an *implied* condition. (Amended Relators' Separate Statement of Genuine Isses ("RSS"), ¶ 19.) The Court overrules Relators' objection. Given that execution of a PPA is an express condition of any educational institution's participation in the FSFA program, the Court finds it wholly material that there is no similar express condition regarding the Tuition Assistance program or GI Bill.

is not to provide Title IV funding, but rather to provide courses on the military bases for a significantly lower tuition than courses offered to civilians at other Chapman academic centers. (Warner Dec. ¶ 4.) Furthermore, Chapman accepts students' Tuition Assistance or GI Bill educational benefits, whether or not the students attend classes on a military installation. (UF ¶ 19.) The false certification theory of FCA liability is only concerned with false certifications of compliance that are a "*prerequisite to obtaining a government benefit.*" *Hendow*, 461 F.3d at 1172 (citing *Anton*, 91 F.3d at 1266) (emphasis added). Because Relators cannot show this, they have failed to raise a triable issue of fact that Chapman is required to certify compliance with a classroom hours requirement as a necessary condition of obtaining Tuition Assistance or GI Bill funding.

2. Fraudulent Course of Conduct

Relators also contend that Chapman fraudulently conceals from WASC, the DOE and the DOD the systematic and chronic problem of permitting early closure of classes by giving the professor the option to teach several hours of instruction without breaks, and then count clock hours in 50 minute increments. In doing this, the professors accrue the Carnegie 10-minute breaks to justify adjourning classes early. This practice, argue Relators, results in Chapman submitting requests for payment based upon padding hours. Moreover, according to Relators, Chapman has an affirmative duty to voluntarily disclose to WASC, the DOE, and the DOD any significant problems in the area of inadequate administration and quality control,

including any significant failure to adhere to the Carnegie standard. (RSS ¶¶ 58-59, 68-69.) Relators have submitted deposition testimony of Chapman University Campus Director Fearnside that "45 contact hours was a Chapman requirement." (Amended Bartley Dec. Vol. 3, Ex. 44 at 17:18-21.)

Relators have failed to raise a triable issue of fact that Chapman engages in fraudulent conduct by not disclosing to WASC its allegedly widespread and chronic problem of releasing classes early. Relator Moyers testified that Chapman maintained a systematic, chronic, entrenched culture and practice of permitting and encouraging very early class closure. (Moyers Dec. ¶ 5.) However, during the relevant period, Moyers was only exposed to 1.3% of all academic center lecture classes. (Pankey Dec. ¶ 4; Warner Dec. ¶ 2.) Relators have also offered testimony by Dr. James Warren, a full-time program manager of Chapman's Monterey academic center, who stated that student complaints were always about an "overly conscientious" professor forcing his class to stay the full time without the breaks being "grouped together."[8] (RSS ¶ 47.) Although Relators contend that Warren's statement evidences Chapman's acquiesence in the "grouping together" of 10-minute breaks, we find the statement actually supports Chapman's position, since it shows Dr. Warren received no student complaints regarding early dismissal of courses. Furthermore, Fearnside stated that whenever she receives information that

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[8] Chapman does not dispute this fact, but argues it is immaterial since WASC does not require a particular number of hours per class session. (Chapman's Reply to Relator's Separate Statement of Genuine Issues ("RSS"), ¶ 47.)

an instructor may have released classes early, in the follow-up, she has found that in nearly every case, the instructor understands and respects the 45 hour contact hour rule, and had a valid explanation or made other arrangements to make up for the missed class time. (Schenck Dec. Ex. T, ¶ 4.)

Chapman, on the other hand, has submitted competent summary judgment evidence disproving Relator's theory regarding a chronic problem regarding faculty-student contact hours. According to Chapman, even though WASC does not require as much, the university does endeavor to follow the Carnegie standard of 15 contact hours per unit credit, or 45 hours per three unit course. (Graham Dec. ¶¶ 8-11.) When Chapman receives a complaint over a class being let out early, Chapman takes reasonable steps to ascertain whether there was a legitimate reason for the early dismissal. (Schenck Dec. Exs. R-DD.) When a Chapman academic center director determines an instructor released a class early without justification, the director counsels the instructor on Chapman's contact hour rules. (Id.) A persisting problem results in nonrenewal of the instructor's contract. (Id.) Nonetheless, whether or not some Chapman instructors accrue Carnegie 10-minute breaks to justify early dismissal, Relators have offered no evidence of a WASC prohibition against this practice. Consequently, Relators have failed to raise a triable issue of fact as to whether Chapman engaged in a fraudulent course of conduct

In sum, the Court finds that Relators have failed to raise a triable issue of fact as to the first element of a federal False Claims Act claim — that Chapman made a false statement or engaged in a fraudulent

course of conduct. Thus, we need not address the remaining three elements of scienter, materiality, and causation. *Hendow*, 461 F.3d 1171 (citations omitted). The Court therefore GRANTS Defendants' motion for summary judgment on Relators' federal *qui tam* claims.

B. California FCA Claim

As noted previously, the requirements for FCA liability under Cal. Gov't Code § 12651 are the same as for federal liability. *See Pac. Bell Tel. Co.*, 142 Cal.App.4th at 747 n. 3; *see also Shasta Servs., Inc.*, 440 F.Supp.2d at 1111. Accordingly, because Relators have failed to raise a triable issue of fact that Chapman made a false statement or engaged in a fraudulent course of conduct with respect to their federal FCA claims, they have likewise failed to raise a triable issue with respect to their state FCA claims. The Court GRANTS Defendants' motion for summary judgment on Relators' state FCA claims.

IV. CONCLUSION

For the reasons set forth above, the Court hereby GRANTS summary judgment on Relators' FCA causes of action under 31 U.S.C. §§ 3729(a)(1) and (2) and 3729 (a)(2) (Counts 1 and 2) and California FCA causes of action under Cal. Gov't Code §§ 12651(a)(1) and (2) (Counts 3 and 4). It is hereby ordered that this case be DISMISSED in its entirety, with prejudice.

IT IS SO ORDERED.

Initials of Preparer /s/

APPENDIX C

28 U.S.C. § 2107 provides:

§ 2107. Time for appeal to court of appeals

(a) Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

(b) In any such action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties shall be sixty days from such entry.

(c) The district court may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing of excusable neglect or good cause. In addition, if the district court finds—

> **(1)** that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry, and
>
> **(2)** that no party would be prejudiced,

the district court may, upon motion filed within 180 days after entry of the judgment or order or within 14 days after receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

(d) This section shall not apply to bankruptcy matters or other proceedings under Title 11.

28 U.S.C. § 2106 provides:

§ 2106. Determination

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

28 U.S.C. § 230 (1934 ed. Supp. I) provides:

§ 230. Time for making application for appeal.

No appeal intended to bring any judgment or decree before a circuit court of appeals for review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree.

28 U.S.C. § 876 (1934 ed. Supp. I) provides:

§ 876. Judgment or decree on review from district court.

The Supreme Court may affirm, modify, or reverse any judgment, decree, or order of a district court, lawfully brought before it for review, or may direct such judgment, decree, or order to be rendered, or such further proceedings to be had by the inferior court, as the justice of the case may require. The Supreme Court shall not issue

execution in a cause removed before it from such courts, but shall send a special mandate to the inferior court to award execution thereupon.

Rev. Stat. § 701 (1875 ed.) provides:

§ 701. The Supreme Court may affirm, modify, or reverse any judgment, decree, or order of a circuit court, or district court acting as a circuit court, or of a district court in prize cases, lawfully brought before it for review, or may direct such judgment, decree, or order to be rendered, or such further proceedings to be had by the inferior court, as the justice of the case may require. The Supreme Court shall not issue execution in a cause removed before it from such courts, but shall send a special mandate to the inferior court to award execution thereupon.

185 (B)

No. 10-810

IN THE

Supreme Court of the United States

UNITED STATES AND CALIFORNIA, ex rel.
KATHERINE R. O'CONNELL, et al.,

Petitioners,

v.

CHAPMAN UNIVERSITY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

This case is a *qui tam* action brought under the False Claims Act in which the United States declined to intervene. Petitioners' notice of appeal was filed 58 days after the district court entered summary judgment for respondent Chapman University—well outside the 30-day period proscribed by 28 U.S.C. section 2107 and Federal Rule of Appellate Procedure 4(a)(1). The question presented is whether the court of appeals erred in concluding that dismissal of petitioners' untimely appeal was required by this Court's decision in *United States ex rel. Eisenstein v. City of New York*, 129 S. Ct. 2230 (2009), which held that an untimely appeal must be dismissed in precisely these circumstances.

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STATEMENT OF THE CASE

A. Nature of Petitioners' Claims

The case below was brought by petitioners as *qui tam* relators pursuant to the False Claims Act (31 U.S.C. §§ 3729, *et seq.*) ("FCA").[1] The United States and the State of California both declined to intervene as parties. C.D. Cal Docket # 8; E.R. 416.[2]

Petitioners' theory of liability was that Chapman falsely represented to a private accreditation association, the Western Association of Schools and Colleges ("WASC"), that Chapman complied with a supposed WASC

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1. Petitioners also pursued parallel state law claims under California's version of the FCA. Cal. Gov. Code §§ 12650, *et seq.* Because the California law is patterned after the FCA, decisions under the FCA are persuasive on the meaning of the California False Claims Act. *State ex rel. Bowen v. Bank of America Corp.*, 126 Cal. App. 4th 225, 236 (2005); *Laraway v. Sutro & Co., Inc.*, 96 Cal. App. 4th 266, 275 (2002), citing *Etcheverry v. Tri-Ag Service, Inc.*, 22 Cal. 4th 316, 320 (2000). The differences between the two statutory schemes are not relevant to the issues raised in the petition.

2. Pursuant to the citation format specified by this Court in Supreme Court Rule 24(g), and to maintain consistency with the citation format used by petitioners, the following record citation abbreviations are used in this brief: 1) "Pet.App." refers to the Appendix filed by petitioners; 2) "CA9 Docket" refers to the Clerk's Docket in the United States Court of Appeals for the Ninth Circuit, Case No. 07-56864 (9th Cir.); 3) "C.D. Cal Docket" refers to the Clerk's Docket in United States District Court, Central District of California, Case 8:04-cv-01256-PSG –RC (C.D. Cal); and 4) "E.R." refers to the Excerpts of Record filed in No. 07-56864 (9th Cir.), *See* CA9 Docket # 38.

requirement to provide 45 hours of classroom instruction for each three credit course it offered. Petitioners theorized that because compliance with accreditation standards is a condition of participating in financial aid programs under Title IV of the Higher Education Act (20 U.S.C. § 1070, *et seq.*) ("HEA") and similar state-funded programs, by allegedly lying to WASC, Chapman defrauded the United States and State of California. The lynchpin in all of Petitioners' theories of liability was that: (1) WASC had a minimum classroom hours requirement, and compliance with this requirement was a condition of accreditation; (2) that Chapman lied (either expressly or implicitly) to WASC about its compliance with the supposed classroom hours requirement; (3) but for its statements, Chapman would not have been accredited by WASC; and (4) Chapman should be deemed not to have been accredited and therefore out of compliance with state and federal student financial aid programs. C.D. Cal Docket # 36 (Second Amended Complaint ¶¶ 42-46).

B. The District Court's Entry Of Judgment For Chapman

After extensive discovery, Chapman filed a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. The district court granted summary judgment, ruling that petitioners failed to raise a triable issue of fact as to the first element of FCA liability—that Chapman made a false statement or engaged in a fraudulent course of conduct. Pet.App. 4a, 16a-18a, 18a-20a. Among other things, the court concluded that petitioners had failed to identify any WASC provision obligating respondent to disclose information concerning classroom hours and that, in the absence of "any WASC

requirement of a quantum of classroom hours," petitioners failed to "establish a false statement that is a condition of government funding." Pet.App. 17a. The district court entered judgment for respondent on October 24, 2007. C.D. Cal Docket # 204; E.R. 5.

C. Petitioners' Jurisdictionally Untimely Appeal

On December 21, 2007—58 **days** after the district court entered judgment—petitioners filed a notice of appeal. Pet.App. 3a; E.R. 1. At that time, there was a split among the circuits as to whether, under Rule 4(a)(1)(A)-(B) of the Federal Rules of Appellate Procedure ("Rule 4") and 28 U.S.C. section 2107(a)-(b) ("§ 2107"), the ordinary 30-day deadline for filing an appeal or the 60-day deadline applicable when the United States is a party applied in an FCA action where the government declined to intervene. The Ninth Circuit's position was that the 60-day deadline governed.

On June 8, 2009, after the parties completed their briefing below but before the Ninth Circuit scheduled oral argument, this Court issued its decision in *United States ex rel. Eisenstein v. City of New York*, 129 S. Ct. 2230 (2009). Resolving the circuit split, this Court determined that the United States is not a "party" for purposes of § 2107 and Rule 4 when it declines to intervene in an FCA action, and therefore, the 30-day time limit for filing an appeal under § 2107(a) and Rule 4(a)(1)(A) applies, not the 60-day time limit under § 2107(b) or Rule 4(a)(1)(b). *Eisenstein*, 129 S. Ct. at 2233, 2236-37.

D. The Ninth Circuit's Dismissal Of The Appeal Under *Eisenstein*

After *Eisenstein*, Chapman promptly moved to dismiss the appeal for lack of jurisdiction. Petitioners then filed a "Motion For Rule 4(a)(5)(A)(ii) Relief and for Stay Pending *Haight*," requesting a stay pending the Ninth Circuit's disposition in *United States ex rel. Haight, et al. v. Catholic Healthcare West, et al.*, Ninth Circuit Case No. 07-16857, another case involving *qui tam* relators who waited more than 30 days to file their notice of appeal. CA9 Docket #54; *See also*, Pet.App. 2a. The Ninth Circuit granted petitioners' motion to stay pending its decision in *Haight*. CA9 Docket #57; *See also*, Pet.App. 2a. The court also ordered petitioners to file either "a response to appellees' motion to dismiss or move for appropriate relief" following the issuance of the remittitur in *Haight*. *Id.*

In accordance with *Eisenstein*, the Ninth Circuit dismissed the appeal in *Haight* as untimely, and this Court denied the *Haight* relators' petition for a writ of certiorari. *United States ex rel. Haight v. Catholic Healthcare West*, 602 F.3d 949 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 366 (2010). Petitioners then filed their motion "for appropriate relief," which they titled a "motion for relief under Rule 4(a)(5)(A)(ii)." The arguments proffered by petitioners in their motion paralleled the arguments made unsuccessfully by the appellants in *Haight*. While presenting various theories for relief, petitioners did not argue that the court of appeals had the authority to consummate an "equitable

vacatur"[3] of the district court's judgment, nor did they ask the court of appeals to undertake any such vacatur.

The Ninth Circuit denied petitioner's motion and granted Chapman's motion to dismiss. Pet.App. 1a-3a. In an unpublished order, the court explained that dismissal was required under *Eisenstein* and the Ninth Circuit's own ruling in *Haight*. Pet.App. 1a-2a. This petition for certiorari followed.

REASONS FOR DENYING THE PETITION

Petitioners concede that their appeal was "jurisdictionally untimely" under this Court's decision in *Eisenstein*, but ask this Court to decide whether the Ninth Circuit was entitled to "vacate and remand for entry of a fresh judgment from which a timely appeal may be taken." Pet. i. There is no reason to grant certiorari to address that question. First, although they floated plenty of theories for avoiding the obvious impact of *Eisenstein*, petitioners did not raise the "equitable vacatur" issue below, and the Ninth Circuit did not address it. Second,

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3. Petitioners use the label "equitable vacatur" to describe this Court's use of its supervisory powers to vacate a district court judgment with an order to issue a fresh judgment in order to correct a procedural error in certain cases involving direct appeals. As noted below, petitioners cite no cases in which this practice has been applied by a court of appeals. Despite this, and for convenience, in this brief the term "equitable vacatur" will be used to describe the equitable relief petitioners argue should have been invoked *sua sponte* by the court of appeals in this case, *i.e.*, an order to vacate the district court judgment and to issue fresh judgment.

petitioners have pointed to no conflict of authority in the circuits on this issue. Although they observe that *this Court* has engaged in the so-called "equitable vacatur" practice to address unique procedural issues in the past, the Ninth Circuit's failure to engage in such a practice here (even assuming it had the authority to do so) in no way conflicts with this Court's decisions. Third, there is no other compelling reason to grant review. Indeed, this Court explicitly recognized in *Eisenstein* that the jurisdictional rule compelled by § 2107 could lead to "harsh consequences," including the dismissal of "pending cases" in which appeals were retroactively deemed untimely. *Eisenstein*, 129 S. Ct. at 2236, n.4. There is no reason for this Court to review the Ninth Circuit's factbound and faithful application of *Eisenstein* here.

I. The Sole Question Presented Was Neither Pressed Nor Passed Upon Below.

1. The Ninth Circuit's unpublished order below represents a straightforward and unsurprising application of *Eisenstein*, which establishes that when the United States has not intervened in an FCA action, the notice of appeal must be filed within 30 days from entry of judgment. This Court recognized in *Eisenstein* that its decision would apply retroactively to late-filed appeals in FCA cases in circuits that had embraced the 60-day rule, explaining that it "must . . . decide the jurisdictional question before it irrespective of the possibility of harsh consequences." *Eisenstein*, 129 S. Ct. at 2236, n.4. The Ninth Circuit took note of this, observing that the question of whether *Eisenstein* applied retroactively was not left open for it to decide. Pet.App. 2a-3a ("*Eisenstein* applies

retroactively and requires dismissal of these appeals. *See*, 129 S. Ct. at 2236 n.4"). Therefore, the Ninth Circuit did not decide any question of federal law or federal practice (see Petition at p. 25) that had not already been settled by this Court. Quite the contrary. Every issue that was material to the Ninth Circuit's disposition of the appeal was expressly settled by *Eisenstein*.

2. In response to Chapman's motion to dismiss the appeal as jurisdictionally untimely under *Eisenstein*, petitioners offered the Ninth Circuit lots of (misguided) theories for avoiding the undeniable impact of *Eisenstein*:

- They asked the court of appeals to assume or deem that they had made a timely motion to the district court under Rule 4(a)(5)(A)(ii) and assume that the district court would have granted such a motion, thereby conferring jurisdiction on the court of appeals and avoiding application of *Eisenstein*. CA9 Docket #58, p. 15-16.

- They argued that although a court of appeals does not have authority to extend the 30-day time limit to file a notice of appeal, it has the authority to consider a Rule 4(a)(5) motion by reading Rule 2 and Rule 26(b) together. *Id.*, p. 16.

- They urged that their notice of appeal was, "in substance and in retrospect, a Rule 4(a)(5)(A)(ii) motion," such that a court of appeals can retroactively recast the notice of appeal as a motion for extension of time pursuant to Rule 2 and Rule 26. *Id.*, p. 15-16.

- They also asked for remand to the district court—not for any so-called "equitable vacatur"—but only so the district court could consider relief under Rule 4. *Id.*, p. 7, 18.

- They asked for a determination that their reliance on the Ninth Circuit's decision in *United States ex rel. Haycock v. Hughes Aircraft Co.*, 98 F.3d 1100 (9th Cir. 1996) constituted "excusable neglect" warranting the relief they sought. *Id.*, p. 6-8.

- Finally, they asserted that retroactive application of *Eisenstein* violated petitioners' due process rights. *Id.*, p. 16-17.

The Ninth Circuit properly rejected each of those arguments and gave effect to this Court's decision in *Eisenstein* and the jurisdictional mandate of § 2017. Pet. App. 2a-3a. Petitioners never asked the court of appeals to consider remanding to the district court with an order to vacate the judgment below and issue a "fresh judgment from which a timely appeal may be taken." Pet. i. There is no reason why petitioners could not have done so. Indeed, a central premise of their certiorari petition to this Court is that the practice of "equitable vacatur" has a long "tradition" and—to believe petitioners—is virtually ubiquitous. Pet. 6.

If petitioners *had* pressed this issue below, the court of appeals might have passed upon several critical questions. Initially, the court could have considered whether or not it even possesses the authority to invoke "equitable vacatur." If the court concluded that it has such authority, it could have proceeded to consider whether that authority exists

in a case involving an untimely appeal under § 2107. In addressing this issue, the court could have considered whether such relief was appropriate in light of *Eisenstein*, and whether invoking equitable relief could be harmonized with *Bowles v. Russell*, 551 U.S. 205 (2007), in which this Court observed that it "has no authority to create equitable exceptions to jurisdictional requirements." *Id.* at 214. Finally, the court could have considered whether petitioners' reliance on the Ninth Circuit's *Haycock* decision to file their notice of appeal more than 30 days after issuance of the judgment warranted invoking extraordinary equitable relief, in light of the existence of a circuit split on this issue and well-established law treating § 2107 as "mandatory and jurisdictional." *Id.* at 209. But, of course, the court of appeals did not consider any of these issues because the question presented in the petition was neither pressed nor passed upon below.

3. This Court rarely grants certiorari to decide a question that was not raised or decided by the court below. *See, e.g., Meyer v. Holley*, 537 U.S. 280, 291-92 (2003) ("in the absence of consideration of that matter by the Court of Appeals, we shall not consider it"); *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212-13 (1998) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them," quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970)); *See also, Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993) (same); *Clark v. Arizona*, 548 U.S. 735, 764-65 (2006) (because the due process issue highlighted by the writ petition was neither pressed nor passed upon below, the Court did not consider the issue); *United States v. Wells*, 519 U.S. 482, 488 (1997) (Supreme Court may consider an issue only when it has

been either pressed or passed by the court below); *United States v. Williams*, 504 U.S. 36, 41 (1992) (This Court's "traditional rule . . . precludes a grant of certiorari . . . when the question presented was not pressed or passed upon below"); *Accord National Collegiate Athletic Assn. v. Smith*, 525 U.S. 459, 470 (1999); *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (*per curiam*); *Duignan v. United States*, 274 U.S. 195, 200 (1927).

There is no reason for this Court to deviate from that long-standing practice and reach out and grant certiorari to decide the question presented here. Indeed, departure from this Court's traditional certiorari practice is particularly unwarranted here, given that the question presented concerns the scope of the court of appeals' own authority and prerogative to exercise such authority if it exists. Not only did the Ninth Circuit not pass upon this question below but petitioners have pointed to *no* court of appeals authority directly addressing it.[4] That the question presented was neither pressed or passed upon below is, by itself, a sufficient basis to deny certiorari.

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4. Petitioners claim that *this Court* has invoked equitable vacatur on various occasions *sua sponte* in the context of various direct appeals. *See*, Petition at p. 17, citing *Franklin v. Lawrimore*, 516 U.S. 801 (1995). But petitioners are not asking *this* Court to engage in a so-called "equitable vacatur," and this case is on certiorari, not direct appeal. Petitioners ask the Court to grant certiorari to decide whether the *Ninth Circuit* should have undertaken an "equitable vacatur." There is no reason for the Court to ignore customary principles governing the exercise of this Court's certiorari jurisdiction—including the venerable "pressed and passed upon rule"—in deciding whether to grant certiorari on that question.

II. The Ninth Circuit's Unpublished Order Dismissing The Appeal Does Not Conflict With Any Decisions Of Other Circuits Or Of This Court.

A. There Is No Conflict Of Authority Among Circuits

Petitioners are not asking *this Court* to do an "equitable vacatur." Instead, they claim that the *Ninth Circuit* should have done it. Pet. i, 7, 22-23. Although petitioners have canvassed some 60 years of Supreme Court precedent, they have not cited a *single* court of appeals case addressing the use of equitable vacatur by a court of appeals (including, of course, the Ninth Circuit's unpublished order dismissing the appeal in this case), much less going their way on it. Nor have petitioners cited a single case from this Court holding, or even remotely suggesting, that a court of appeals should, or even may, invoke "equitable vacatur" in these circumstances. And, even if the court of appeals had authority to engage in such an "equitable vacatur," there is no argument that it was *required* to exercise that equitable authority here, such that its failure to do so requires reversal. For this reason alone, the Ninth Circuit's decision below does not create any conflict of authority requiring this Court's intervention.

B. The Ninth Circuit's Order Dismissing This Appeal Does Not Conflict With Any Decision Of This Court

Nor have petitioners identified any conflict of authority with this Court's decisions. None of this Court's decisions cited by petitioners discuss whether the courts

of appeals are authorized (or required) to engage in "equitable vacatur" in the type of circumstances here. And, if anything, the cases cited by petitioners involving what they label as "equitable vacatur" establish that the practice is not generally applicable, its use is primarily historical,[5] and it has been invoked only by this Court and only in very limited circumstances not present here.

None of the "equitable vacatur" cases identified by petitioners provides that the Ninth Circuit was required (or even authorized) to engage in an equitable vacatur here. Petitioners' fifty-plus examples of "equitable vacatur" all involve cases subject to direct appeals to this Court from three-judge district courts. These direct appeals cases can be broken down into five primary categories: (1) opinions discussing a district court's erroneous decision to convene a three-judge panel under former 28 U.S.C section 380;[6] (2) opinions discussing the propriety of a district court's erroneous decision to convene a three-judge panel under

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5. Of the more than 50 instances of purported "equitable vacatur" cited by petitioners, the most recent application was in 1995. *Franklin v. Lawrimore*, 516 U.S. 801 (1995). Since 1977, equitable vacatur has been used three times, each time without discussion. *Id.*; *Clinton v. Jeffers*, 503 U.S. 930 (1992); *Ayers v. Winter*, 467 U.S. 1211 (1984).

6. *Phillips v. United States*, 312 U.S. 246, 248, 254 (1941); *William Jameson & Co. v. Morgenthau*, 307 U.S. 171, 173-74 (1939) (*per curiam*); *Rorick v. Bd. of Com'rs of Everglades Drainage Dist.*, 307 U.S. 208, 212-13 (1939); *Int'l Ladies' Garment Workers' Union v. Donnelly Garment Co.*, 304 U.S. 243, 251-52 (1938) (*per curiam*); *Wall v. McNee*, 296 U.S. 547, 548 (1935) (*per curiam*); *Gully v. Interstate Natural Gas Co.*, 292 U.S. 16, 18-19 (1934) (*per curiam*); *Oklahoma Gas & Electric Co. v. Oklahoma Packing Co.*, 292 U.S. 386, 391-92 (1934).

28 U.S.C. section 2281;[7] (3) opinions discussing whether a judgment entered by the three-judge district court panel was subject to direct appeal under 28 U.S.C. section 1253;[8] (4) opinions discussing appellants who erroneously filed a direct appeal of the decision of a single judge;[9] and (5) orders where this Court applied equitable vacatur to direct appeal questions without discussion.[10]

While this Court did not explain the reason for invoking "equitable vacatur" in many of these decisions, other authorities have concluded that "equitable vacatur" was granted in each of these cases to correct errors

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7. *Butler v. Dexter*, 425 U.S. 262, 267 (1976) (*per curiam*); *Bd. of Regents of Univ. of Texas Sys. v. New Left Ed. Project*, 404 U.S. 541, 545 (1972); *Moody v. Flowers*, 387 U.S. 97, 104 (1967); *Pennsylvania Pub. Util. Comm'n v. Pennsylvania R. Co.*, 382 U.S. 281, 282 (*per curiam*) (1965).

8. *MTM, Inc. v. Baxley*, 420 U.S. 799, 804 (1975) (*per curiam*); *Dickson v. Ford*, 419 U.S. 1085 (1974); *Perez v. Ledesma*, 401 U.S. 82, 88 (1971); *Rockefeller v. Catholic Med. Ctr. of Brooklyn & Queens, Inc.*, 397 U.S. 820 (1970) (*per curiam*); *Mitchell v. Donovan*, 398 U.S. 427, 431-32 (1970) (*per curiam*); *United States v. Belt*, 319 U.S. 521, 522-23 (1943).

9. *Gonzalez v. Automatic Emp. Credit Union*, 419 U.S. 90, 101 (1974); *United States v. Christian Echoes Nat. Ministry, Inc.*, 404 U.S. 561, 566 (1972) (*per curiam*); *Wilson v. City of Port Lavaca, Tex.*, 391 U.S. 352 (1968) (*per curiam*); *Mengelkoch v. Indus. Welfare Comm'n*, 393 U.S. 83, 83-84 (1968) (*per curiam*).

10. Petitioners cite a handful of equitable vacatur cases with respect to which Chapman was unable to find any Supreme Court document, lower court decision, or secondary source that described the reason for applying equitable vacatur. *Ayers v. Winter*, 467 U.S. 1211 (1984); *Rogers v. Inmates' Councilmatic Voice*, 422 U.S. 1031 (1975); *Daniel v. Waters*, 417 U.S. 963 (1974).

involving use of three-judge district court panels or errors in taking a direct appeal—situations obviously not presented here. These sources include: (1) decisions from other courts (both underlying district court cases and later decisions) discussing the facts of the cases where this Court has used equitable vacatur;[11] (2) a Supreme Court treatise;[12] (3) the jurisdictional statements filed in the various direct appeals, explaining that the case was filed with this Court as a direct appeal resulting from an

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11. *Franklin v. Lawrimore*, 516 U.S. 801 (1995) (*See, Castro County, Tex. v. Crespin*, 101 F.3d 121, 124-25 (D.C. Cir. 1996)); *Clinton v. Jeffers*, 503 U.S. 930 (1992) (*See. Jeffers v. Clinton*, 796 F. Supp. 1202, 1203 (E.D. Ark. 1992)); *Winters v. Lavine*, 429 U.S. 1012 (1976) (*See, Winters v. Lavine*, 574 F.2d 46, 53 (2d Cir. 1978)); *Webster v. Perry*, 417 U.S. 963 (1974) (*See, Webster v. Perry*, 367 F. Supp. 666, 667-68 (M.D.N.C. 1973)); *Edelman v. Townsend*, 412 U.S. 914, 915 (1973) (*See, Alexander v. Weaver*, 345 F. Supp. 666, 668 (N.D. Ill. 1972)); *Bd. of Pub. Instruction v. Banks*, 401 U.S. 988 (1971) (*See, Banks v. Bd. of Pub. Instruction of Dade County*, 314 F. Supp. 285, 287 (S.D. Fla. 1970)); *Hutcherson v. Lehtin*, 400 U.S. 923 (1970) (*See, Hutcherson v. Lehtin*, 313 F. Supp. 1324, 1325 (N.D. Cal. 1970)); *Carlough v. Richardson*, 399 U.S. 920 (1970) (*See, Carlough v. Finch*, 309 F. Supp. 1025, 1027 (S.D. Fla. 1969)); *Dahl v. Republican State Comm.*, 393 U.S. 408 (1969) (*per curiam*) (*See, Dahl v. Republican State Comm.*, 319 F. Supp. 682, 683-84 (W.D. Wash. 1970)).

12. *1A West's Fed. Forms, Supreme Court § 241, Jurisdiction on Appeal from a United States District Court-Introductory Comment*, Bennett Boskey (5th ed.), discussing several decisions (*Democratic Exec. Comm. of Columbiana Cnty. v. Brown*, 422 U.S. 1002 (1975); *Smart v. Texas Power & Light Co.*, 421 U.S. 958 (1975); *Custom Recording Co. v. Blanton*, 421 U S. 943 (1975); *BT Inv. Managers Inc. v. Dickinson*, 421 U.S. 901 (1975)) that resulted from errors in the direct appeal procedures.

error of a three-judge panel;[13] and (4) cases where this Court applied "equitable vacatur" without discussion, but cited directly to past Supreme Court precedent where "equitable vacatur" was utilized to relieve the parties of an error involving direct appeal or a three-judge panel.[14] Not a single "equitable vacatur" case identified by petitioners involves § 2107—the jurisdictional statute at issue here, which has been the subject of recent decisions by this Court.[15]

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13. *Burlington N., Inc. v. Sterling Colorado Beef Co.*, 429 U.S. 1084 (1977) (*See*, jurisdictional statement at 1976 WL 194552, *1); *Gustafson v. Hoffman*, 429 U.S. 806, 806-807 (1976) (*See*, jurisdictional statement at 1976 WL 194321, *2-3); *Shouse v. Pierce County*, 425 U.S. 929 (1976) (*See*, jurisdictional statement at 1976 WL 194730, *1); *Nat'l Socialist White People's Party v. Walsh*, 425 U.S. 929 (1976) (*See*, jurisdictional statement at 1976 WL 194720, *1-2); *Stamler v. Willis*, 393 U.S. 407 (1969) (*per curiam*) (*See*, jurisdictional statement at 1968 WL 129265, *10).

14. *Stivers v. Minnesota*, 429 U.S. 1084 (1977); *Mendez v. Heller*, 420 U.S. 916 (1975); *Custom Recording Co. v. Blanton*, 421 U.S. 943 (1975); *Smart v. Texas Power & Light Co.*, 421 U.S. 958 (1975); *Driskell v. Edwards*, 419 U.S. 812 (1974); *Sumrall v. Kidd*, 394 U.S. 215 (1969) (*per curiam*); *Dahl v. Republican State Comm.*, 393 U.S. 408 (1969) (*per curiam*); *Skolnick v. Bd. of Comm'rs*, 389 U.S. 26 (1967) (*per curiam*); *Canton Poultry, Inc. v. Conner*, 388 U.S. 458 (1967) (*per curiam*).

15. This Court has recently considered the jurisdictional nature of the time limits imposed by § 2107. Interpreting § 2107 in *Bowles*, this Court recognized that it has "long held that the taking of an appeal within the prescribed time is 'mandatory and jurisdictional.'" *Bowles*, 551 U.S. at 209 (citing six cases dating back to 1848). Therefore, "an appeal has not been prosecuted in the manner directed, within the time limited by the acts of Congress, . . . must be dismissed for want of jurisdiction," and "this Court has no authority to create equitable exceptions to jurisdictional

Moreover, unlike every "equitable vacatur" case relied on by petitioners, and unlike *Bowles*, this case does not involve an error in the proceedings below. Rather, petitioners' claimed "error" was their *own* reliance on the Ninth Circuit's interpretation of the deadline for filing an appeal under § 2107 at a time when there was a clear circuit split on this jurisdictional issue. *See, United States ex rel. Haycock v. Hughes Aircraft Co., supra,* 98 F.3d at 1102 (identifying an "intercircuit conflict"). Despite the circuit split and this Court's holding in *Bowles* that § 2107 is "mandatory and jurisdictional," petitioners ***chose*** to wait 58 days to file their notice of appeal. There is nothing within existing law that requires, or even suggests, that "equitable vacatur" should have been considered by the Ninth Circuit under the circumstances of this case, much less that "equitable vacatur" was *required* in these circumstances. And, in any event, any *historical* practice of engaging in "equitable vacatur" to circumvent jurisdictional requirements is outmoded under this Court's recent precedents, including *Bowles* and *Eisenstein.*[16]

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requirements." *Bowles,* 551 U.S. at 210, 214. The Court recently reaffirmed that understanding in *Henderson v. Shinseki,* ("the statutory limitation on the length of an extension of the time to file a notice of appeal in an ordinary civil case is 'jurisdictional,' and we therefore held [in *Bowles*] that a party's failure to file a notice of appeal within that period could not be excused based on equitable factors. . . ."). *Henderson v. Shinseki,* 131 S.Ct 1197, 1201-1202 (2011). Although petitioners' petition appears to based on the unstated premise that *Bowles* is wrong or at least "question[able]," Pet. 24 (citing Scott Dodson, *The Failure of* Bowles v. Russell, 43 Tulsa L. Rev. 631 (2008)), petitioners do not ask this Court to overrule *Bowles* and therefore must accept it on its terms. Pet. 9.

16. None of the dicta on which petitioners rely (Pet. 25-26) from *Reed Elsevier, Inc. v. Muchnick,* 130 S. Ct. 1237 (2010), alters

28 U.S.C. section 2106 ("§ 2106") does not require any different result. That statute generally describes the function of the Supreme Court and the circuit courts to review cases "lawfully brought before [the court] for review." § 2106. Here, petitioners' untimely appeal was not "lawfully brought before [the Ninth Circuit Court of Appeals] for review" because it was indisputably "jurisdictionally untimely." Pet. i. Petitioners argue that Congress implicitly ratified the purported practice of "equitable vacatur" in its 1948 revisions to what is now § 2106, but there is nothing either in the text of the statute or in the legislative history or cases upon which they rely to support their hypothesis.[17] To the contrary, the authority relied on by petitioners as the earliest application of

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the precedential force of those decisions. And this Court's decision in *Henderson*—which simply held that this Court's precedents (including *Bowles*) governing the jurisdictional requirements for review by *Article III* courts did not control "review by an *Article I* tribunal as part of a unique administrative scheme," *Henderson*, 131 S. Ct. at 1204—does not help petitioners either.

17. The 1948 revisions to what is now § 2106 were part of H.R. 3214, 80th Cong. (1948) (enacted), an omnibus effort to recodify federal procedural law and gather it in one title. S. Conf. Rep. No. 80-1559, at 1-2; Cong. Rec. 6,7927 (1948). The specific revision to the predecessor to § 2106, which inserted "or a court of appeals" after "Supreme Court" was done "upon authority of *United States v. Illinois Surety Co.*, C.C.A. 1915, 226 F. 653, *affirmed* 37 S. Ct. 614, 244, U. S. 376, 61 L. Ed. 1206, wherein it was held that this section also applied to the courts of appeals in view of section 11 of the Circuit Court of Appeals Act of Mar. 3, 1891, ch. 517, 28 Stat. 829." H.R. Conf. Rep. No. 80-308, at A173 (1947). The statute was revised to recognize that the courts of appeals have the power to modify district court judgments and orders. There is no indication that Congress intended to expand this Court's occasional use of "equitable vacatur" to correct procedural errors in direct appeals cases.

"equitable vacatur" demonstrates that this Court's assumed authority to invoke "equitable vacatur" was derived from the direct appeal statutes themselves, and not any general jurisdictional statute. *Gully v. Interstate Nat. Gas Co.*, 292 U.S. 16, 18 (1934) (*per curiam*). In any event, there certainly is no conflict of authority over the proper application of § 2106 in this context.

III. There Is Otherwise No Compelling Reason To Grant Certiorari.

A. In Deciding *Eisenstein*, This Court Knew There Could Be "Harsh Consequences"

Petitioners decry the result below—dismissal of their late-filed appeal as jurisdictionally untimely—as "inequitable." Pet. 5. But this Court expressly recognized in *Eisenstein* that its decision would require pending appeals like petitioners' to be dismissed. Specifically, Eisenstein argued that affirming the dismissal of his appeal would "unfairly punish those who relied on the holdings of courts adopting the 60-day limit in cases in which the United States was not a party." *Eisenstein*, 129 S. Ct. at 2236, n.4. In fact, relators in another Ninth Circuit FCA case who filed an appeal more than 30 days after entry of judgment filed an *amicus* brief in *Eisenstein* arguing that appeals like theirs should not be dismissed. Brief of Amici Curiae Patricia Haight and in Defense of Animals, *United States ex rel. Eisenstein v. City of New York*, 129 S. Ct. 2230 (2009) (No. 08-660); *See also*, 2009 WL 583802 (Patrica Haight was a relator in *United States ex rel. Haight et al. v. Catholic Healthcare West, et al.*, Ninth Circuit Case No. 07-16857). The *Haight amici* argued that they were entitled to rely on existing Ninth

Circuit precedent (*i.e.*, *Haycock*) permitting appeals up to 60-days after entry of judgment in FCA cases in which the United States has not intervened, and urged this Court to reverse the Second Circuit, or in the alternative, issue a prospective ruling. *Id.* at 4-12. In *Eisenstein*, a unanimous Court turned away these arguments, noting that it "must . . . decide the jurisdictional question before it irrespective of the possibility of harsh consequences." *Eisenstein*, 129 S. Ct. at 2236, n.4.[18]

Petitioners here are in exactly the same position as the unsuccessful *Eisenstein amici*. That the dismissal of their appeal would be required by § 2107 despite apparent harsh consequences was foreseen by this Court.

B. The District Court Properly Concluded That Petitioners' Claims Are Meritless

Nor is the loss of the appeal in this False Claims Act case troublesome on the merits. In its motion for summary judgment, Chapman demonstrated that petitioners' claim failed on several fundamental levels. However, in granting Chapman's motion, the district court relied on the most glaring flaws. First, the district court agreed with existing case law in concluding that "the HEA imposes no affirmative duty on Chapman to insure accreditation standards are unfailingly maintained, and no FCA claim can be maintained based on standards that are not a prerequisite to payment of government funds." Pet.App.

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18. As noted above, following *Eisenstein*, the Ninth Circuit dismissed the appeal of the *Haight amici*, and this Court denied *certiorari*. *United States ex rel. Haight v. Catholic Healthcare West*, 602 F.3d 949 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 366 (2010).

17a, citing *U.S. ex rel. Diop v. Wayne County Comm. College Dist.*, 242 F. Supp. 2d 497, 532-534 (E.D. Mich. 2003).

Most importantly, however, the district court recognized that petitioners' entire case rested upon the existence of WASC's "strict 45 hour rule," but no such rule even exists. The district court concluded: "In the absence of any WASC requirement of a quantum of classroom hours, [petitioners] cannot establish a false statement that is a condition of government funding." Pet.App. 17a. Petitioners' subsidiary theories of liability were similarly flawed.[19] Pet.App. 18a-20a, 20a-23a.

Of course, petitioners were free to bring a *timely* appeal from that ruling. But they indisputably failed to do so. And nothing about the Ninth Circuit's factbound—and unassailably correct—application of *Eisenstein* leading to that result warrants this Court's review.

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19. For example, Petitioners alleged that Chapman falsely certified compliance with requirements in certain memoranda of understanding ("MOU") with the United States Department of Defense. However, the district court ruled that on their face, the MOUs are not related to receipt of government funds. Pet. App. 18a-20a. And, Petitioners also brought a state False Claims Act claim, but this claim failed for the same reasons as the FCA claim. Pet.App. 23a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

UNITED STATES AND CALIFORNIA *EX REL.* O'CONNELL AND MOYERS,

Petitioners,

v.

CHAPMAN UNIVERSITY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Respondent does not dispute the five key propositions that support granting the petition:

First, an appellate court "without power to proceed with [an] appeal" may still "exercise ... its supervisory appellate power [to] dispos[e] of the case as justice requires." *Walling v. James V. Reuter, Inc.*, 321 U.S. 671, 676 (1944); Pet. 11-12.

Second, this Court exercises that supervisory power "to save appellants their proper remedies," if jurisdictional ambiguity caused them to appeal here rather than to the proper Court of Appeals, by "vacat[ing] the decree and remand[ing]" so the district court "may enter a fresh decree from which appellants may ... perfect a timely appeal to the circuit court of appeals." *Phillips v. United States*, 312 U.S. 246 (1941); Pet. 12-15.

Third, this Court has employed that "equitable vacatur" practice for at least 60 years, in 50 cases, by 30 Justices (including a current majority). Pet. 12-18.

Fourth, the parties in both *Bowles v. Russell*, 551 U.S. 205 (2007), and *United States ex rel. Eisenstein v. City of New York*, 129 S. Ct. 2230 (2009), failed to advise this Court of that longstanding practice, which caused those cases to be decided under the misimpression that the only available options were to adjudicate the merits despite the jurisdictional defect (which was deemed improper) or to dismiss the appeal despite the equitable justification (which thus was deemed necessary). Pet. 7-10, 27-28.

Fifth, although *Bowles* and *Eisenstein* do not expressly reject equitable vacatur where, as here, a jurisdictionally untimely appeal is filed in reasonable

reliance on subsequently overruled circuit precedent, the Ninth Circuit understandably construed those cases to require dismissal. Pet.App. 2a-3a; *United States ex rel. Haight v. Catholic Healthcare West*, 602 F.3d 949, 953 (9th Cir. 2010); Pet. 2-4.

Unable to contest these points, Respondent primarily argues that the question presented was not preserved. BIO 6-10. That, however, is clearly wrong: Petitioners' claim of entitlement to equitable relief from dismissal of their appeal was pressed and passed upon below, and there are compelling justifications for review regardless.

Respondent's secondary argument is that Petitioners' equitable vacatur cases all involved direct appeals to this Court, rather than to the Courts of Appeals. *Id.* 11-18. But that distinction is legally irrelevant. As Judge Henry Friendly cogently observed:

> We know the Supreme Court has many powers that we do not; but we can see no basis for thinking that if the Supreme Court, with its limited direct appellate jurisdiction over the district courts, can vacate a district court judgment when an appeal was not properly before it, a court of appeals, which regularly reviews judgments of the district courts, cannot.

United States v. New York, New Haven & Hartford R.R. Co., 276 F.2d 525, 545 (2d Cir. 1960)("*NY R.R.*").

The Ninth Circuit's conclusion that *Bowles* requires dismissal thus conflicts with this Court's vacatur precedents and is a critical jurisdictional error that only this Court can realistically correct. Certiorari should be granted.

I. THE QUESTION PRESENTED WAS BOTH PRESSED AND PASSED UPON BELOW AND SHOULD BE REVIEWED REGARDLESS

Respondent principally asserts that the question presented was neither pressed nor passed upon below and thus should not be reviewed. BIO 6-10. That assertion is wrong at every level.

A. Under well-settled precedent, Petitioners preserved the specific question presented here by generally claiming below that they are entitled to equitable relief from dismissal of their appeal. "A litigant seeking review in this Court of a claim properly raised in the lower courts ... generally possesses the ability to frame the question ... without being limited to the manner in which the question was framed below." *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992). It thus "can make any argument in support of that claim" and is "not limited to the precise arguments [it] made below." *Id.* at 534.

In *Yee*, petitioners asserting a Takings claim made a *physical* takings argument below, but not necessarily a *regulatory* takings argument. *Id.* This Court held that, even if they had *not* made that "precise argument[]" below, they "could have formulated [that] argument ... here." *Id.* at 534-35. Their "arguments that the ordinance constitutes a taking ... by physical occupation and by regulation, [were] not separate *claims*," but "rather, separate *arguments* in support of a single claim." *Id.*; *see also Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 378-79 (1995) (petitioner who preserved a First Amendment claim could even raise a supporting argument he "expressly disavowed" below).

Here, as Respondent itself demonstrates (BIO 7-8), Petitioners below raised the "consistent claim" (*Lebron*, 513 U.S. at 379) that they are entitled to equitable relief from dismissal of their appeal, given their reasonable reliance on controlling circuit precedent. CA9 Docket # 54, 56, 58. Indeed, not only did Petitioners request a remand so the district court could provide relief under Fed. R. App. P. 4, *id.* # 58 at 6, 17, but they even suggested remanding so that court could, under Fed. R. Civ. P. 60(b), enter "an amended judgment for purposes of renewing the appeal period," *id.* # 56 at 2, 15-17.

In short, Petitioners' claim of entitlement to equitable relief from dismissal of their appeal was vigorously pressed below. Having thus preserved that "claim," Petitioners are "not limited to the precise arguments [they] made below" and instead may "make any argument in support of that claim," including the "equitable vacatur" question now presented. *Yee*, 503 U.S. at 534.

B. "[E]ven if this *were* a claim not raised by [P]etitioner[s] below," this Court will "review ... an issue not pressed so long as it has been passed upon." *Lebron*, 513 U.S. at 379. And here, the Ninth Circuit squarely held that "*Eisenstein* applies retroactively and requires dismissal of th[is] appeal[]" and that "remand would be futile." Pet.App. 2a-3a. This holding was compelled by *Haight*, which concluded that *Bowles* and *Eisenstein* "instructed ... that concerns of equity must give way before the 'rigorous rules' of statutory jurisdiction," and thus even untimely appeals that "reasonably relied on Ninth Circuit precedent" "must be dismissed." 602 F.3d at 953. Indeed, Respondent itself describes the Ninth

Circuit as holding that this Court's precedent mandates dismissal of untimely appeals regardless of equitable justifications. BIO i ("The question presented is whether the court of appeals erred in concluding that dismissal of petitioners' untimely appeal was required by [*Eisenstein*], which held that an untimely appeal must be dismissed in precisely these circumstances.").

C. In any event, although this Court "[o]rdinarily ... does not decide questions not raised or resolved in the lower court," "the rule is not inflexible." *Youakim v. Miller*, 425 U.S. 231, 234 (1976). And there are two compelling justifications for granting review here regardless of the scope of earlier litigation.

First, this Court has suggested flexibility is appropriate where arguments below likely would have been futile. *Id.* at 235 ("Had appellants relied on the Supremacy Clause issue as a separate ground for decision[,] it would appear that the claim would have been rejected by the District Court."). Here, speculation is unnecessary, for this Court's own precedents were the source of probable futility.

The facial import of *Bowles* and *Eisenstein* is that "concerns of equity must give way before the 'rigorous rules' of statutory jurisdiction," such that even untimely appeals that "reasonably relied on Ninth Circuit precedent" "must be dismissed." *Haight*, 602 F.3d at 953. To be sure, those precedents are technically distinguishable because the appellants failed to seek equitable vacatur relief. Pet. 7-10, 27-28. Critically, however, this Court has instructed lower courts to leave for this tribunal the adoption of such distinctions of settled precedent.

Specifically, in *Eberhart v. United States*, 546 U.S. 12 (2005) (*per curiam*), the Seventh Circuit believed a rule was jurisdictional under two of this Court's precedents, even though that characterization contradicted more recent decisions concerning over-use of the jurisdictional label. *Id.* at 14-15. This Court granted certiorari and reversed, but it factually distinguished the older cases, rather than overruling them. *Id.* at 16-18. Although the Seventh Circuit could have done likewise, this Court nevertheless *expressly commended* it for following the "prudent course" of not "upsetting what [it] took to be our settled precedents." *Id.* at 19-20. Given that this Court plainly sought to deter the Courts of Appeals from anticipating possible factual distinctions of settled precedent, it necessarily contemplated that parties would initially raise such distinctions here, as Petitioners are doing.

Second, the equitable nature of the question presented militates against any forfeiture finding. This Court routinely has exercised *sua sponte* discretion in improper appeals to award vacatur relief. Pet. 21-22. There is no apparent reason for greater rigidity in exercising certiorari discretion to review the purely legal question whether the Courts of Appeals can award such relief.

Indeed, where doing so furthers this Court's recent jurisprudential project of clarifying and cabining jurisdictional rules (Pet. 9; *Henderson v. Shinseki*, 131 S. Ct. 1197, 1202-03 (2011)), this Court has conspicuously departed from its normal certiorari practices. Most notably, even though it "ordinarily do[es] not consider questions outside those presented in the petition for certiorari," *Yee*,

503 U.S. at 535, this Court in *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237 (2010), itself added the question whether a copyright requirement conceded to be jurisdictional was in fact so, and then held it was not. Pet. 25-26. Obviously, this Court has been "tr[ying] in recent cases to bring some discipline to the use of [jurisdiction]," "[b]ecause the consequences that attach to the jurisdictional label may be so drastic." *Henderson*, 131 S. Ct. at 1202.

This case presents the *simultaneous* opportunity to add some "discipline" missing in *Bowles* (due to the parties' inadequate briefing) and to reduce the jurisdictional label's "drastic" effect (by reaffirming the safety-valve of equitable vacatur). Given the relative obscurity of the equitable vacatur practice, it is unclear when this Court would have another such opportunity.

II. THE EQUITABLE VACATUR POWER EXERCISED BY THIS COURT IN DIRECT APPEALS IS NECESSARILY SHARED BY THE COURTS OF APPEALS, AND THIS COURT'S IMMEDIATE REVIEW IS NECESSARY TO REVIVE THAT IMPORTANT PRINCIPLE OF FEDERAL JURISDICTION

Respondent distinguishes this Court's longstanding equitable vacatur practice in direct appeals because this case was appealed to the Court of Appeals instead. BIO 11-18. But, as Judge Friendly observed long ago, *see supra* at 2; *infra* at 12, that procedural distinction is legally irrelevant. It thus does not: (A) resolve the square conflict between the Ninth Circuit's order and this Court's precedent; (B) justify Respondent's exaggeration of the absence of a square circuit conflict; or (C)

eliminate the need for this Court to correct the misperception created by *Bowles* that no equitable remedies are available when appellate jurisdiction is lacking.

A. The Ninth Circuit's Conclusion That *Bowles* Requires Dismissal Squarely Conflicts With This Court's Equitable Vacatur Tradition

Petitioners previously demonstrated that it *necessarily follows* from this Court's equitable vacatur practice that the Courts of Appeals have *the same power* when judicial error causes an appellant's noncompliance with the jurisdictional deadline in 28 U.S.C. § 2107:

(1) both situations *equally involve* a court that lacks appellate jurisdiction over the merits but has supervisory power to justly dispose of the case in a way that facilitates *a future timely appeal under § 2107* in the Court of Appeals, Pet. 11-12, 22-23;

(2) it is *more legitimate* for the Courts of Appeals to exercise such vacatur power, since they at least have statutory *subject-matter* appellate jurisdiction, whereas this Court has *no* jurisdiction over improper appeals, *id.* 23;

(3) reasonable reliance on circuit precedent is a *better equitable claim* than existed in many of this Court's cases, which involved *open* jurisdictional questions, *id.* 21, 23-24;

(4) the vacatur practice has a *stronger historical pedigree* than § 2107's jurisdictional treatment, *id.* 24; and

(5) Congress' *ratification* of the vacatur practice *equally applies* to the Courts of Appeals, *id.* 18-20.

Respondent fails to undermine these points.

1. Respondent's principal argument is that "every" one of this Court's direct-appeal cases "involve[d] an error in the proceedings below"—the implication being that, unlike here, vacatur was appropriate only to correct the alleged error. BIO 16. But that argument is completely wrong.

Of the 23 cases where the vacatur's basis was evident, Petitioners showed that there were 10 cases where the *only* error was the *appellant's* mistaken decision to directly appeal a valid judgment here rather than to the circuit court. Pet. 16 & nn.5-8. Oddly, Respondent itself *agrees* for 8 of them, refuting its own argument. BIO 13 & nn.8-9.

Moreover, even for the 13 vacatur cases where three-judge courts were unnecessarily convened, Pet. 12-15 & n.4, those courts did not commit *legal error*. As Petitioners explained, if a three-judge panel is convened when it is not required, that does not affect "the federal jurisdiction of the district court," but *only* whether "this Court has jurisdiction to hear the appeal," as opposed to "the Circuit Court of Appeals." Pet. 14 (citing *Okla. Gas & Elec. Co. v. Okla. Packing Co.*, 292 U.S. 386, 391 (1934)); *accord NY R.R.*, 276 F.2d at 544 (Friendly, J.).

2. Similarly, Respondent mistakenly contends that "[n]ot a single" one of this Court's direct-appeal cases "involve[d] § 2107." BIO 15. In fact, however, they *all* did, because § 2107 was the *sole* reason equitable vacatur was needed: "[b]y mistakenly appealing directly to this Court, [appellants] ha[d] lost their opportunity to have the decree below reviewed on its merits, as the time for appeal to the Circuit Court of Appeals ha[d] expired." Pet. 14 (quoting *Okla. Gas & Elec.*, 292 U.S. at 392). The

only difference is those appellants failed to satisfy § 2107 because they appealed to the wrong court, whereas Petitioners appealed to the right court but relied on controlling circuit precedent adopting the wrong deadline. That distinction, however, *supports* Petitioners. *Id.* 22-23; *see also NY R.R.*, 276 F.2d at 545 (Friendly, J.).

3. Respondent also unjustifiably contends that Petitioners are more culpable than the appellants in the vacatur cases, since Petitioners "**chose** to wait 58 days to file their notice of appeal" "when there was a clear circuit split on th[e] jurisdictional [deadline]." BIO 16. But Petitioners' reliance on *controlling circuit precedent* was more reasonable than *guessing* how *open* jurisdictional questions would be resolved, as did many appellants who received vacatur relief. Pet. 23-24. Moreover, those appellants "chose" not to file a "protective appeal" in circuit court, *id.* 24, which is less defensible than "choosing" not to appeal early to avoid expediting the briefing, *Bowles*, 551 U.S. at 223 n.9 (Souter, J., dissenting).

4. Respondent repeatedly stresses the Ninth Circuit is not *required* to provide equitable vacatur relief. BIO 11-12, 16. Petitioners agree that relief is discretionary, Pet. 20, but the Ninth Circuit never exercised its discretion, because it wrongly believed that *Bowles* and *Eisenstein* foreclosed equitable relief and required dismissal.

5. Finally, Respondent erroneously attacks the vacatur practice's legitimacy, suggesting that "any *historical* practice of engaging in 'equitable vacatur' to circumvent jurisdictional requirements is outmoded under this Court's recent precedents, including *Bowles* and *Eisenstein*." BIO 16, 18-19.

But those precedents held only that § 2107 is *jurisdictional*. Pet. 3, 7-10. Petitioners are *not* questioning that holding, *id.* 9-10, because appellate courts that concededly lack merits jurisdiction nevertheless possess supervisory power to justly dispose of the case. Pet. 11-12. That is the *whole point* of this petition: *Bowles* and *Eisenstein*, having decided the jurisdictional question, overlooked a traditional equitable remedy for jurisdictionally untimely appeals *because the parties failed to raise it*, thereby inadvertently causing lower courts to feel bound to dismiss all such appeals.

That said, *if Bowles* conflicted with the longstanding equitable vacatur tradition, the latter should prevail, since *Bowles* rests *entirely* on a *less* developed tradition. Pet. 6, 10, 24. Indeed, this Court last month unanimously reaffirmed that history is the only reason *Bowles* is exempt from "the strict definition of jurisdiction" and "bright line" test that this Court otherwise "ha[s] recommended in [its] recent cases." *Henderson*, 131 S. Ct. at 1203.

B. Respondent Exaggerates The Absence Of A Square Circuit Conflict

Although Respondent emphasizes the lack of a square circuit split, BIO 11, that is unsurprising. Since *Bowles*, lower courts' obligation to avoid upsetting this Court's precedents based on technical distinctions has effectively foreclosed the Courts of Appeals from invoking the equitable vacatur practice. *See supra* at 5-6. And prior to *Bowles*, the Courts of Appeals had no need to invoke the equitable vacatur practice in the context of untimely direct appeals, since the more straightforward (but less legitimate) "unique circumstances" doctrine was

available. Pet. 8, 27.

Furthermore, in the one context where the need did arise—*i.e.*, where the appellant mistakenly appealed to the Court of Appeals, causing the time for taking a direct appeal here to expire—the equitable vacatur practice was unhesitatingly applied. Writing for the Second Circuit, Judge Friendly held that there was "no basis for thinking that ... the Supreme Court, with its limited direct appellate jurisdiction over the district courts, can vacate a district court judgment when an appeal was not properly before it, [but] a court of appeals, which regularly reviews judgments of the district courts, cannot." *NY R.R.*, 276 F.2d at 544-45. His typically irrefutable logic applies here equally, which further bolsters the case for review.

C. Correcting The Misperception Created By *Bowles* Warrants This Court's Review Even Absent A Square Conflict

Finally, as discussed, the parties' failure in *Bowles* to advise this Court of the equitable vacatur practice caused that case to be decided in a way that effectively forecloses lower courts from employing the practice. That unfortunate result, standing alone, warrants this Court's review. This Court generally has not hesitated to correct deleterious oversights or imprecision in its cases. Pet. 27. And intervention is especially warranted here, where *Bowles*' party-induced omission hinders this Court's concerted efforts "in recent cases to bring some discipline to the use of [jurisdiction]," "[b]ecause the consequences that attach to the jurisdictional label may be so drastic." *Henderson*, 131 S. Ct. at 1202.

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

UNITED STATES AND CALIFORNIA *EX REL.*
O'CONNELL AND MOYERS,

Petitioners,

v.

CHAPMAN UNIVERSITY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

BRIEF FOR FEDERAL JURISDICTION PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

Amici curiae listed in the Appendix are law professors who teach and write in the field of federal jurisdiction. Although *amici* hold a range of views on the proper scope of federal jurisdiction, *amici* all have a common interest in the clarification of the scope of federal jurisdiction and of judicial authority to regulate it. On that basis, *amici* respectfully submit this brief in support of the petition.[1]

SUMMARY OF ARGUMENT

Bowles v. Russell held that the deadline to file a notice of appeal in a civil case under 28 U.S.C. § 2107 is jurisdictional. 551 U.S. 205 (2007). Another line of cases has held that this Court has a "supervisory appellate power"—even though its appellate jurisdiction is lacking—to vacate a lower court decision for a "fresh decree" to restart the clock for filing a notice of appeal. *E.g.*, *Walling v. Reuter*, 321 U.S. 671, 676-77 (1944); *Phillips v. United States*, 312 U.S. 246, 254 (1941). Petitioner seeks certiorari on whether the U.S. Courts of Appeals have a similar power in the face of an untimely appeal under § 2107.

This Court should hear and resolve Petitioner's important question of federal jurisdiction. *Amici* recognize that Petitioner's proposal, at first blush, may seem easily dismissed as contravening the conven-

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of *amici* to file this brief. The parties have consented to the filing of this brief and their letters of consent are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their academic institutions made a monetary contribution to its preparation or submission.

tional view of jurisdiction as "inflexible" and "without exception." *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 577 (1999). *Amici* aim to assuage these concerns by putting Petitioner's proposal in a broader context. In that context, jurisdiction often is regulated by non-jurisdictional procedural rules that themselves are subject to court or party discretion. Petitioner's proposal fits within this broader context.

This Court should therefore grant the petition to clarify the scope of procedural regulation of appellate jurisdiction and to determine whether Petitioner's proposal is a permissible mechanism for doing so.

ARGUMENT

I. JURISDICTIONALITY AND NONJURISDICTIONALITY ARE NOT MUTUALLY EXCLUSIVE.

The conventional view is that jurisdiction is different in kind than other requirements of substance and procedure and occupies mutually exclusive doctrinal space. Jurisdiction is the "power" of the Court. *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868). As such, and generally unlike matters of procedure or substance, jurisdiction normally is seen as having a number of special features: It must be satisfied at the outset; it cannot be consented to; jurisdictional defects cannot be waived, forfeited, or excused for equitable reasons, and may be raised by any party any time before final judgment; the court has an obligation to assure itself of its own jurisdiction at all times; and judgments entered without jurisdiction are void. *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). These features usually are seen as reserved for jurisdictional issues.

In reality, however, nonjurisdictional questions can have these jurisdictional features too. *See* Scott Dodson, *Mandatory Rules*, 61 STAN. L. REV. 1, 6 (2008). And they often do. *See, e.g.*, *Day v. McDonough*, 547 U.S. 198, 206-07 (2006) (a habeas petitioner's procedural default may be raised sua sponte); *Eberhart v. United States*, 546 U.S. 12, 19 (2005) (Federal Rule of Criminal Procedure 45(b) is "inflexible"); 28 U.S.C. § 2254(b)(3) (a federal habeas petitioner's exhaustion requirement cannot be forfeited by the State); *cf. Kontrick v. Ryan*, 540 U.S. 443, 457 n.12 (2004) (certain bankruptcy rules may not be circumvented by consent of the parties).

II. NONJURISDICTIONAL RULES CAN REGULATE JURISDICTION IN MANY WAYS.

The flip side is true as well: Courts and parties can regulate jurisdiction using nonjurisdictional rules or features that are tied to the jurisdictional doctrine. As the following examples illustrate, this connection between jurisdictionality and nonjurisdictionality exists in a variety of contexts.

A. Incorporation

A rule could be jurisdictional yet also, as a definitional matter, incorporate nonjurisdictional features. These features simply create inlets in the jurisdictional boundary. *See* Perry Dane, *Jurisdictionality, Time, and the Legal Imagination*, 23 HOFSTRA L. REV. 1, 65 (1994). Section 2107 is, in fact, a good example, for it allows a district court to extend the jurisdictional deadline to file a civil appeal for "excusable neglect or good cause" and to "reopen" it for other reasons. 28 U.S.C. § 2107(c). In these circumstances, the jurisdictional deadline simply shifts in accordance with judicial discretion.

B. Preconditions

A jurisdictional rule could depend upon preconditions that themselves are susceptible to nonjurisdictional treatment. Again, the appellate deadline provides an illustration. The statute requires a "notice of appeal" to be "filed" within the deadline, *id.* § 2107(a), but what "notice of appeal" and "filed" mean are subject to some discretion by the court, *see Smith v. Barry*, 502 U.S. 244, 245 (1992) (treating an appellate brief as a "notice of appeal" for purposes of Rule 3); *Houston v. Lack*, 487 U.S. 266, 268 (1988) (treating a pro se prisoner's notice as "filed" when delivered to prison authorities). In other words, a "filed" "notice" may be a mandatory precondition to appellate jurisdiction, but what satisfies that precondition is subject to judicial discretion.

Another example is the requirement of a "final" decision of a district court for appellate jurisdiction to attach. 28 U.S.C. § 1291(a). What is "final" is subject, under Rule 54(b), to some district-court discretion. A district court can render a nonfinal judgment final and appealable "if the court expressly determines that there is no just reason for delay." FED. R. CIV. P. 54(b). Thus, a district court can create or preclude appellate jurisdiction by exercising discretion over the "finality" precondition.

C. Timing

The traditional conception of jurisdiction is that it must be resolved at the outset—the court cannot proceed to decide other nonjurisdictional matters until it has satisfied itself of jurisdiction. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998) ("The requirement that jurisdiction be established as a threshold matter springs from the nature and lim-

its of the judicial power of the United States and is inflexible and without exception."). But this Court has allowed resequencing of difficult jurisdictional issues in favor of easier procedural issues. *See Sinochem Int'l Co. v. Malay Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007) (upholding dismissal under the nonjurisdictional doctrine of forum non conveniens without first establishing the existence of subject-matter jurisdiction). Through resequencing, parties can present certain procedural issues for decision even though the court lacks (or is unsure about) subject-matter jurisdiction over the case.

Likewise, the timing of jurisdictional determinations generally is a nonjurisdictional rule within the control of the court and parties. Jurisdiction normally is assessed at the time of invocation. Yet a case that lacks diversity jurisdiction at the time of filing or removal because of a nondiverse defendant can be "cured" of that defect by later dismissal of the nondiverse defendant. *See, e.g., Caterpillar Inc. v. Lewis*, 519 U.S. 61, 64 (1996). The reason is that the time-of-invocation rule is a nonjurisdictional rule that yields to countervailing policy considerations of finality, efficiency, and economy. *Id.* at 75. Nonjurisdictional timing rules thus moderate jurisdiction.

D. Proof Mechanisms

Proof mechanisms allow procedural regulation of federal jurisdiction. Jurisdictional findings are dependent upon party-presented pleadings and evidence. The reason is that "jurisdiction itself is a legal conclusion, a *consequence* of facts rather than a provable 'fact.'" *Meridian Sec. Ins. Co. v. Sadowski*, 441 F.3d 536, 540-41 (7th Cir. 2006) (Easterbrook, J.) (emphasis in original). As such, the parties and

court can control the mechanisms of jurisdictional proof and allegations, thereby affecting the ultimate exercise of federal jurisdiction.

For example, a plaintiff's good faith allegation of damages exceeding the jurisdictional minimum is sufficient to satisfy statutory diversity jurisdiction unless the amount cannot be recovered to a legal certainty. *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288-89 (1938). The satisfaction of this amount-in-controversy requirement is predominantly left up to the plaintiff's chosen allegations, regardless of whether the requirement is *in fact* satisfied.

If the plaintiff's allegation is challenged by the defendant or the issue is raised by the court, then the plaintiff must prove that the diversity-jurisdiction requirements are satisfied by a preponderance of the evidence. *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936). At such a jurisdictional hearing, the court presumably will take evidence to resolve questions of jurisdictional fact. *See* Howard M. Wasserman, *Jurisdiction and Merits*, 80 WASH. L. REV. 643, 662 (2005). But the parties will control what evidence is presented, how it is presented, and what evidentiary motions and objections are made. Those decisions and evidentiary rules are nonjurisdictional issues that could influence what factual findings the court can make on the jurisdictional issues themselves.

Thus, for example, some courts have relied on the nonjurisdictional Federal Rules of Evidence to refuse to allow the use of settlement offers to prove the amount in controversy. *E.g.*, *McDevitt v. Guenther*, 522 F. Supp. 2d 1272, 1284-86 (D. Haw. 2008). In determining party's citizenship for purposes of diversity jurisdiction, parties conceivably could control the

presentation of facts supporting a particular citizenship, such as evidence of an individual's domicile, or evidence of the location of a company's "nerve center." Proof mechanisms then enable parties, even within the bounds of their legal obligations, to present allegations and evidence in a way that may lead to a jurisdictional finding contrary to fact.

III. PETITIONER'S PROPOSAL FITS WITHIN THIS TRADITION OF JURISDICTIONAL REGULATION.

Petitioner's proposal is that a Court of Appeals faced with an untimely appeal can vacate the district court judgment and remand for a fresh decree to restart the appellate deadline of § 2107. For a number of reasons, this proposal fits within the tradition of allowing certain procedures to regulate jurisdiction.

First, Petitioner's proposal is similar to other procedural regulations of appellate jurisdiction. The proposal is limited to those contexts in which good cause is shown for missing the original deadline. *Cf.* 28 U.S.C. § 2107(c). Akin to the flexibility in interpretation of statutory terms exhibited in *Smith* and *Houston*, the proposal might be interpreted as a nonmerits vacatur rather than a prohibited "review" of the decree. *Cf. id.* § 2107(a).

Second, Petitioner's proposal is founded upon a species of "jurisdiction to determine jurisdiction," which itself is a recognized doctrine of jurisdictional regulation. *Cf. United States v. United Mine Workers*, 330 U.S. 258, 291-93 (1947) (recognizing the doctrine despite a lack of original jurisdiction). Its use to uphold contempt sanctions, as in *United Mine Workers*, is not fundamentally different than its use in Petitioner's proposal here.

Third, Petitioner's proposal, even if different than the specific illustrations above, is still within the broader scope that they exemplify. Nonjurisdictional facets of procedure can and do regulate jurisdiction, and there is nothing inherently objectionable about it. Petitioner's proposal fits within this tradition of procedural regulation of jurisdiction.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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